

DEPARTMENT OF HOMELAND SECURITY
FEDERAL LAW ENFORCEMENT TRAINING CENTER
OFFICE OF MISSION INTEGRATION
LEGAL DIVISION



Homeland Security

LESSON PLAN

FEDERAL CRIMINAL LAW	
1091	JUN/09

WARNING

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Legal Division

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Senior Instructor
Legal Division

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Senior Instructor
Legal Division

Risk Assessment: This instruction is delivered in a classroom, typically in Buildings 216, 210, 212, or 261-3. Risk of injury to instructors and students is low. Primary risks are fires, explosions and other dangers requiring that you evacuate the classroom and building.

Recommended evacuation procedures:

1. Before beginning class, mentally note the nearest building exit.
2. If an alarm sounds, take the following steps:
 - a. Designate [by seat position and pointing] one student at each table to be the "squad leader." Tell the squad leaders to account for the people at their table after the group reaches the assembly area and report the results to you. Tell everyone else to stay close to their squad leader.
 - b. Direct all students to follow you and take them out the nearest building exit.
 - c. Take them to an assembly area sufficiently far from the building so that you do not interfere with evacuation or emergency response. Keep your group out of the roads and exits around the building.
 - d. Remind the squad leaders to account for their people and report to you.
3. If no alarm sounds, but you hear an explosion, smell smoke, etc., take the following steps:
 - a. If the need to evacuate is not apparent, send a student out each room door to find out what is happening. Tell them to return within two minutes and, if they find the room empty, to leave the building by the nearest exit, find you and tell you they're back.
 - b. If necessary, initiate the evacuation procedures noted in the preceding paragraph.
 - c. Report the situation to security personnel by using the following numbers: 2-911; 912-267-(b)(6), or 912-267-(b)(6).

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SYLLABUS

COURSE TITLE: FEDERAL CRIMINAL LAW

COURSE NUMBER: 1091

COURSE DATE: JUN/09

LENGTH OF PRESENTATION:

	LECTURE	LAB	P.E.	TOTAL	PROGRAM
A	14:00			14:00	CITP
B	2:00			2:00	USMP-IS
C	6:00			6:00	LMPT, UPTP, A_FAMTP
D	2:00			2:00	ICITP
E	6:00			6:00	
F	12:00			12:00	
G	6:00			6:00	ICE-D
H	4:00			4:00	FWSL WIBS
I	8:00			8:00	A_BPOTP

DESCRIPTION:

Through lecture and discussion, this course provides the student with an introduction to criminal law and selected Federal offenses. This course is actually a series of independently taught sessions. These course sessions may be taught by different instructors, so it is imperative that all objectives are covered during the time scheduled. This Lesson Plan covers courses to be provided to many different types of federal officers. Because of this, the EPOs are outlined below with a designation as to which EPOs are to be taught in each course. A generalized outline of course sessions has also been provided for the benefit of the instructor. These should be used only as a general guide. The EPO list should be referred to in determining precisely what material to teach to a specific student group. Instructors will be best served if they treat this Lesson Plan as an encyclopedia of several different courses, the course sessions as a rough guide, and the EPO list as the definitive list of material to cover in a particular course.

TERMINAL PERFORMANCE OBJECTIVE (TPO):

Given a set of facts depicting possible violations of major statutory offenses, the student will identify whether a crime is alleged and determine, if so, whether all elements of the crime are present in accordance with Federal statutes.

ENABLING PERFORMANCE OBJECTIVES (EPO):

Master EPO	EPO	Numbers indicate the session(s) in which the EPO is taught.								
Introduction to Criminal Law / Assault / Bribery (2 hours)		A	B	C	D	E	F	G	H	I
1	Identify the elements of a criminal statute.	1	X	1	X			1	1	X
2	Distinguish between a felony and a misdemeanor.	1	X	1				1	1	X
3	Identify how the Assimilative Crimes Act is applied and distinguish between exclusive, concurrent, and proprietary jurisdiction.	1	X	1				1	1	X
4	Identify the elements of Title 18 U.S.C. § 111.	1	X	1	X			1	1	X
5	Identify the elements of Title 18 U.S.C. § 201.	1	X	1				1	1	X
Federal Firearms Violations (2 hours)		A	B	C	D	E	F	G	H	I
6	Identify categories of individuals prohibited from possessing firearms.	2		2		1	1	2		X
7	Identify procedures to initiate a firearms trace through the Bureau of Alcohol, Tobacco, & Firearms.	2		2		1	1	2		X
8	Identify the weapons listed in Title 18 U.S.C. § 922(a)(4) that require registration with the Bureau of Alcohol, Tobacco, & Firearms and those weapons prohibited on a federal facility.	2		2		1	1	2		X
Parties (1 hour - included in Conspiracy with Option A; included in Theft / False Statements with Option C)										
18	Identify when a person may be prosecuted for assisting another in the commission of a crime, in accordance with Title 18 U.S.C. §§ 2-4.	4/5		3	X		3/4			X
Entrapment (1 hour - often taught in a two hour block with False Statements)		A	B	C	D	E	F	G	H	I
9	Recognize when an inducement by the government is permitted or prohibited.	3					2	3		
10	Recognize when predisposition negates an apparent entrapment defense.	3					2	3		

False Statements (1 hour - see EPO #24 for UPTP and LMTP)		A	B	C	D	E	F	G	H	I
11	Identify the elements of Title 18 U.S.C. § 1001.	3		3	X	2	2	3	2	
Conspiracy (4 hours) (EPO 18 is ordinarily taught with Conspiracy. Check that EPO.)		A	B	C	D	E	F	G	H	I
12	Identify how many persons are needed to form a conspiracy.	4/ 5					3/ 4			X
13	Identify when knowledge and intent are sufficient to constitute a conspiracy.	4/ 5					3/ 4			X
14	Recognize an agreement and its functions according to the provisions of Title 18 U.S.C. § 371.	4/ 5					3/ 4			X
15	Recognize the function of an overt act in the crime of conspiracy.	4/ 5					3/ 4			X
16	Identify when a co-conspirator's statement may be used during the prosecution of a conspiracy. [Not currently taught in any program]									
17	Identify the limits of the withdrawer's or late joiner's criminal liability.	4/ 5					3/ 4			X
Parties (1. hour)		A	B	C	D	E	F	G	H	I
18	Identify when a person may be prosecuted for assisting another in the commission of a crime, in accordance with Title 18 U.S.C. §§ 2-4.	4/ 5		3	X		3/ 4			
Obstruction of Justice (2 hours)		A	B	C	D	E	F	G	H	I
19	Identify conduct that can be prosecuted under Title 18 U.S.C. §§ 1503 and 1510.	6					5			
20	Identify the groups of persons who are protected under Title 18 U.S.C. §§ 1512 and 1513.	6					5			
21	Identify conduct that constitutes "tampering," in violation of Title 18 U.S.C. § 1512 and conduct that constitutes "retaliation" in violation of Title 18 U.S.C. § 1513.	6					5			

Federal Fraud Statutes (2 hours)		A	B	C	D	E	F	G	H	I
22	Identify the elements of the Mail Fraud statute, Title 18 U.S.C. § 1341 and the Wire Fraud Statute, Title 18 U.S.C. § 1343.	7					6			
23	Identify the elements of the National Stolen Property Act, Title 18 U.S.C. § 2314.	7					6			
Theft / Embezzlement (2 hours - include EPO #11 when teaching this as a block)		A	B	C	D	E	F	G	H	I
24	Identify the elements of Title 18 U.S.C. § 641.	C B T.		3		2			2	

STUDENT SPECIAL REQUIREMENTS:

For each Session, students will refer to the corresponding section of the student text.

METHOD OF EVALUATION:

Written, multiple-choice examination.

INSTRUCTOR GUIDE

METHODOLOGIES:

1. Lecture
2. Question and answer

TRAINING AIDS:

1. Instructor
PowerPoint / Overhead Projector
2. Student:
Student text

SPECIAL INSTRUCTOR REQUIREMENTS:

NONE

OUTLINE OF INSTRUCTION

I. INTRODUCTION TO CRIMINAL LAW / ASSAULT / BRIBERY

A. RAPPORT AND OPENING STATEMENT

1. Criminal law is a very broad legal area. While officers should strive to learn every aspect of criminal law which applies to their job, it is not possible for a new officer to become an expert in criminal law during a brief training period. This course provides an overview of the fundamentals of criminal law and training on selected Federal criminal offenses.
2. This first block of instruction covers Introduction to Criminal Law, Assault, and Bribery. Bribery (18 U.S.C. § 201) is not an EPO for all students. Instructors should refer to the master list and teach the Bribery EPO only to those students who are required to receive this instruction.

B. ENABLING PERFORMANCE OBJECTIVES

EPO #1: Identify the elements of a criminal statute.

EPO #2: Distinguish between a felony and a misdemeanor

EPO #3: Identify how the Assimilative Crimes Act is applied and distinguish between exclusive, concurrent, and proprietary jurisdiction.

EPO #4: Identify the elements of Title 18 U.S.C. § 111.

EPO #5: Identify the elements of Title 18 U.S.C. § 201.

C. EPO #1: IDENTIFY THE ELEMENTS OF A CRIMINAL STATUTE

1. Criminal law is a foundation of the criminal justice system. The subject of criminal law studies what actions are criminally punishable by the government. A crime is an act, or failure to act, punishable by the government. Typical crimes include robbery, rape, burglary, and murder. Crimes are different from torts in that criminal actions are brought by the government for the purpose of punishing the wrongdoer and deterring others from similar conduct. A tort is a civil action for compensation. For example, if a criminal committed a burglary, the government could prosecute him and place him in jail. In a tort action, the victim could sue the wrongdoer for an intentional tort to recover his stolen items.
2. All criminal statutes in the United States are in writing. Each statute contains elements, or components. Each of these elements must be met for the crime to have been completed. At trial the prosecution must prove all the elements of a crime beyond a reasonable doubt to obtain a conviction. Most crimes require a criminal intent and criminal act. In

other words, an individual must both intend to commit a crime and then act in furtherance of that intent. However, that is not true in all cases. For example, a parent could be criminally charged with child abuse for not acting to care for his child.

3. Motive is a very important fact for the investigator and prosecutor. It can be used to solve crimes by identifying potential perpetrators and to prove criminal intent. However, motive is usually never an element of a crime. So-called "hate crime" legislation aimed at those who target certain individuals for assault (minorities, homosexuals, etc.) is an exception to this rule. While brief reference may be made to these laws in class, the issues raised by considering motive in prosecuting "hate crimes" is beyond the scope of this course.
4. The elements of crimes are best explained by example. The federal crime of murder, 18 U.S.C. § 1111 requires "the unlawful killing of a human being with malice aforethought." Murder requires a criminal intent, malice aforethought. Murder also requires a criminal act, to wit: the unlawful killing of a human being. This statutory construction is typical of criminal statutes in the United States.
5. All criminal statutes also require a penalty. Without penalties, our criminal system would have no meaning. These penalties can include fines, probation, incarceration and death. Most criminal statutes provide a range of potential penalties, based on the severity of the offense.

D. EPO #2: DISTINGUISH BETWEEN A FELONY AND A MISDEMEANOR

1. Crimes are distinguished by the potential penalty faced by the criminal. In general, both the federal government and the States define a felony as an offense punishable by over one year in prison. A misdemeanor is an offense punishable by no more than a year in prison.
2. 18 U.S.C. § 3559 specifically classifies federal sentences. A felony is an offense for which the maximum term of imprisonment authorized is more than one year. A misdemeanor is an offense for which the maximum term of imprisonment is one year or less.

E. EPO #3: IDENTIFY HOW THE ASSIMILATIVE CRIMES ACT IS APPLIED AND DISTINGUISH BETWEEN EXCLUSIVE, CONCURRENT AND PROPRIETARY JURISDICTION

1. Jurisdiction relates to the legal authority to act where the crime was committed. The authority of the United States (and therefore its law enforcement officers) depends on the type of jurisdiction applicable to a certain area. Within the boundaries of the United States, there are three basic types of jurisdiction. These are exclusive jurisdiction, concurrent jurisdiction, and proprietary jurisdiction. Before examining

jurisdiction it is necessary to determine what type of federal law is to be enforced.

2. Types of Federal Laws

- a. Laws of General Application: Laws passed by Congress that are "necessary and proper" for the conduct of its business. (There is some federal connection, and regardless of where the crime occurs, the defendant can be prosecuted by the Federal Government).
- b. Examples of laws of general application: 18 U.S.C. 111 Assault on Federal Employee; 18 U.S.C. 641 Theft of Government Property; 18 U.S.C. 371 Conspiracy; 18 U.S.C. 201 Bribery; 18 U.S.C. 1001 False Statements.
- c. Other Federal Laws: where the location of the offense matters. These statutes only apply on certain federal land where the federal government has jurisdiction.
- d. Examples: 18 U.S.C. 1852 Timber removed or transported (. . . that is growing on the public lands of the United States . . .); 18 U.S.C. 1853 Trees cut or injured (. . . growing upon any land of the United States . . .); 18 U.S.C. 661 Theft of Non-Government Property (within the special maritime and territorial jurisdiction) of the United States.

3. Federal Jurisdiction: There are several ways the Federal government obtains the right to enforce its laws on land acquired within a state.

- a. Article 1, § 8, Clause 17 of the United States Constitution.
"The Congress shall have Power... To exercise exclusive Legislation in all cases whatsoever, over such District (not exceeding ten Miles square) as may, by cession of particular States, and the Acceptance of Congress, become the seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful Buildings; --"
- b. Other Methods of Acquiring Jurisdiction:
 - 1) Federal reservation (often lands always held in Federal ownership);

- 2) State cession of land to the Federal government for post offices, military installations, prisons, etc. (particularly prior to 1940)
- 3) Title 40 U.S.C. § 255 (U.S. Govt. must accept State's cession offer post -1940)
- c. Basic Constitutional Authority for Land Management Agencies: The Property Clause. In sum, the Property Clause of the Constitution provides that: *"The Congress shall have Power to dispose of and make all needful rules and Regulations respecting the Territory or other Property belonging to the United States...."* U. S. Const., art. IV, § 3, Cl. 2.
- d. Exclusive Jurisdiction: Exclusive jurisdiction exists where the Federal government has received, by whatever method, all the law enforcement authority of the State with no reservations made to the State. The Federal government conducts all law enforcement activities within these types of areas. State and local law enforcement have no jurisdiction to enforce laws in these areas. Examples areas of exclusive jurisdiction are Yellowstone National Park, and some Federal buildings and military installations.
- e. Concurrent Jurisdiction: Concurrent jurisdiction exists where a State has granted law enforcement authority to the United States while reserving to itself the right to exercise full law enforcement authority over the area concurrently. In areas of concurrent jurisdiction, both State and Federal Governments may conduct law enforcement activities and may prosecute for criminal violations in their respective court systems. Examples of areas of concurrent jurisdiction are Cape Canaveral National Sea Shore, Grand Canyon National Park, and some military installations.
- f. Proprietary Jurisdiction: Proprietary jurisdiction exists where the Federal government has acquired some right or title to lands but has not obtained any measure of the State's authority over the area. The Federal government may buy or lease the property, but generally has rights equivalent to a private landowner. However, under the Supremacy and Property Clause of the United States Constitution, Federal law enforcement officers may enforce laws of general application and Federal regulations enacted to protect these areas. Most Forest Service and BLM lands in the western United States are considered owned under proprietary jurisdiction. As public land in the West was withdrawn from

entry and private ownership to create the National Forests, Congress made it clear that the affected States would not lose jurisdiction over these properties. Title 16 U.S.C. § 480 states:

"The jurisdiction, both civil and criminal over persons within National Forests shall not be affected or changed by reason of their existence except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the state wherein any such National Forest is situated shall not, by reason of the establishment thereof, lose its jurisdiction nor the inhabitants thereof, their rights and privileges as citizens or be absolved from their duties as citizens of the state."

4. Assimilative Crimes Act. The Assimilative Crimes Act (Title 18 U.S.C. § 13) comes from the word "assimilate", which means to take in and incorporate as one's own; to absorb. The first such law was passed in 1825. The present act was passed in 1948, and last amended in 1996. It provides, in pertinent part, that:
 - a. *"Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in § 7 of this title [the statute defining "special maritime and territorial jurisdiction of the U.S."], or on, above, or below any portion of the territorial sea of the United States not within the jurisdiction of any State, Commonwealth, territory, possession, or district is guilty of any act or omission which, although not made punishable by enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment."*
 - b. *"... for purposes of subsection (a) of this section, that which may or shall be imposed through judicial or administrative action under the law of a State, territory, possession, or district, for a conviction for operating a motor vehicle under the influence of a drug or alcohol, shall be considered to be a punishment provided by that law."*
 - c. *Any limitation on the right or privilege to operate a motor vehicle imposed under this subsection shall apply only to the special maritime and territorial jurisdiction of the United States."*
5. Policy Behind the Statute. The policy behind this statute is to afford

those persons on Federal enclaves the same protection as citizens within the surrounding State, and allow State law to become Federal law when there is no Federal law available. The Assimilative Crimes Act allows acts to be prosecuted in Federal court which:

- a. Are a violation of State law,
 - b. Committed on property where the United States has either exclusive or concurrent jurisdiction and
 - c. There is no Federal law available to charge.
6. Assimilation is not available in areas of proprietary jurisdiction. Officers must first know if they are operating within an area of exclusive or concurrent jurisdiction in order to know if they can assimilate state laws.
 7. A Federal Crime Must Not Exist. The Assimilative Crimes Act *operates only when Federal law has not defined the criminal offense*. When a Federal statute or regulation exists prohibiting the conduct, officers cannot use the Assimilative Crimes Act to enlarge or narrow the scope of the crime.

F. EPO# 4: IDENTIFY THE ELEMENTS OF TITLE 18 U.S.C. § 111.

1. Every year, Federal law enforcement officers are assaulted in the line of duty. In order to deter offenders and punish them for using violence against federal officers and employees, Congress enacted 18 U.S.C. § 111 entitled, Assaulting, resisting, or impeding certain officers or employees.
2. By common law definition, an assault is any willful attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability to do so, and any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm. A battery is intentional and wrongful non –consensual physical contact (touching) by a person (or an object controlled by that person) with another person. Most modern statutes and 18 U.S.C. § 111 use the term “assault” to include both the common law acts of assault and battery.
3. 18 U.S.C. §111 protects individuals designated in 18 U.S.C. §1114 from assault. Those designated in 18 U.S.C. §1114 for protection under 18 U.S.C. §111 include “any officer or employee of the United States or of any agency in any branch of the United States government (including any member of the uniformed services), or any person assisting such an officer or employee in the performance of such duties or on account of that assistance”
4. Specifically, 18 U.S.C. §111 reads as follows:

- a. "Whoever-- (1) *forcibly* assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in §1114 of this title while engaged in or on account of the performance of official duties; or (2) forcibly assaults or intimidates any person who formerly served as a person designated in §1114 on account of the performance of official duties during such person's term of service, shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and where such acts involve physical contact with the victim of that assault or the intent to commit another felony, be fined under this title or imprisoned not more than 8 years, or both."
 - b. "Enhanced penalty. Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both."
- 5. 18 U.S.C. §1114 reads as follows:
 - a. "Whoever kills or attempts to kill *any officer or employee of the United States, or of any agency in any branch of the United States Government (including any member of the uniformed services)* while such officer or employee is engaged in or on account of the performance of official duties, *or any person assisting such an officer or employee* in the performance of such duties or on account of that assistance, shall be punished . . ."
- 6. Of additional interest: Title 18, U.S.C. §115, "Influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member." This statute: (1) protects the families of public officials, judges, and law enforcement officers from retaliatory assault, kidnapping, or murder (including attempts) and (2) punishes threats to do so when the intent is to impede, intimidate or interfere with the Federal official's duty.

7. “Forcibly” means by use of force.
- a. *Actual physical contact is not necessary.* Force need not actually have been used; it is sufficient if it was imminently threatened. United States v. Walker, 835 F.2d 983 (2d. Cir. 1987).
 - b. “Forcibly” as used in this section means the defendant forcibly assaulted *or* forcibly resisted *or* forcibly opposed *or* forcibly impeded *or* forcibly intimidated *or* forcibly interfered with the victim but the government need not prove that the defendant did all of those things. It is sufficient that he did any one of the acts charged. Long v. United States, 199 F.2d 717 (4th Cir. 1952). The courts are divided on whether there must be some form of common-law assault to support a charge under 18 U.S.C. 111. It appears the most logical reading is that an individual who refuses lawful commands and must be subdued by force is in violation of 18 U.S.C. 111. United States v. Gagnon, 553 F.3d 1021 (6th Cir. 2009). However, some courts have held that merely refusing an order (such as “tensing up” and standing firm when an officer attempts to handcuff) is not sufficient to support a charge under 18 U.S.C. 111. United States v. Chapman, 528 F.3d 1215 (9th Cir. 2008).
 - c. Lifting of a menacing hand toward an officer, or shoving, or spitting in the officer’s face, can be prosecuted under §111. Although some use of force is required, §111 does not require that the Federal officer be placed in fear or injured.
 - d. All threats of imminent physical harm and any use of physical force is sufficient to satisfy the element of assault. Many fact patterns satisfy this element, including interfering in a pursuit by federal officers, letting dogs loose to attack federal officers, and pointing an empty gun at officers.
 - e. Resistance:
 - 1) As a general rule, no person has a right to resist arrest. Even where the arrest is unlawful, the remedy

is for the suspect to submit to the arrest and then file civil and/or criminal charges. Therefore, the unlawfulness of the arrest is not a defense. However, there is some case law suggesting that the use of minimal force to resist unlawful arrest does not violate the law. Realistically, the Department of Justice would not likely pursue a prosecution against an individual who used minimal resistance (like pushing or running away) to avoid an unlawful arrest.

8. Performance of Official Duties: While § 111 does not set forth what constitutes “official duties” and courts construing this language agree that “there is no bright-line test to define performance of official duties.” United States v. Hoy, 137 F.3d 726, 729 (2d Cir. 1998), quoting, United States v. Hoffer, 869 F.2d 123, 125 (1989).
 - a. The courts in determining if a federal agent is engaged in the performance of his official duties examine whether the agent is acting within the scope of what he is employed to do or whether he was engaging in a personal frolic of his own. Hoffer, 869 F.2d at 126, quoting, United States v. Heliczzer, 373 F.2d 241 (2d Cir. 1967), see also, United States v. Clemons, 32 F.3d 1504, 1507 (11th Cir. 1994); United States v. Cunningham, 509 F.2d 961 (U.S. App. D.C. 1975).
 - b. Whether a federal officer wears a uniform, badge or other identifying credentials is not an essential component of the test, nor is location or work assignment. Defendants have faced criminal liability under § 111 when they assaulted:
 - (1) an off-duty park ranger enforcing park rules, United States v. Hohman, 825 F.2d 1363 (9th Cir. 1987);
 - (2) an off-duty DEA officer getting a haircut and overhearing a robbery in progress, United States v. Reid, 517 F.2d 953 (2d Cir. 1975);
 - (3) an IRS agent repossessing a car, United States v. Steich, 759 F.2d 579 (7th Cir. 1985);
 - (4) a federal judge walking to the federal

- courthouse on a Sunday evening to research a case, United States v. Boone, 738 F.2d 763 (6th Cir. 1984);
- (5) a federal agent detaining a state-charged suspect, United States v. Lopez, 710 F.2d 1071 (5th Cir. 1983);
 - (6) an off-duty deputy U.S. Marshal arresting a suspect after coming upon a street fracas, United States v. Hoy, 137 F.3d 726 (2d Cir. 1998).
 - (7) An immigration officer who entered a bar to investigate report of three unlawful immigrants was performance of official duties. Amaya v. United States, 247 F.2d 947 (9th Cir. 1957).
 - (8) a U.S. Secret Service agent who, while en route to investigation of credit card fraud, was assaulted after she stopped to assist a person at scene of accident, since her actions were professional and appropriate, and indicia of her official capacity were evident. United States v. Kelley, 850 F.2d 212 (5th Cir. 1988).
- c. Each of these cases illustrates the fluidity of the term “while engaged” and refuses to define “official duties” either with a rigid time line or highly circumscribed activity. Additionally, Congress has made no attempt to circumscribe these holdings. Hoy, at 730.
- d. An agent need not be actually engaged in the performance of his duties to come under the protection of this section. Federal employees are also protected from retaliatory assaults initiated on account of the performance of official duties. For example: A DEA Agent was a guest at a wedding reception when he was singled out and brutally attacked solely because he was a DEA Agent. United States v. Velarde, 528 F.2d 387 (9th Cir. 1975). The assailant was convicted. United States v. Hohman, 825 F.2d 1363, 1365 (9th Cir. 1987) shows how a single assault can meet both variations of this element. Ranger Miller had

finished his shift at Lake Mead NRA and changed into jogging shorts when he saw a loose dog on the beach. When he told the dog's owner that this violated park rules, the owner (Hohman) punched him twice. Ranger Miller's supervisor testified that he "was required to enforce park regulations 24 hours a day." In the words of the court: "When Miller asked Hohman to comply with local regulations by removing the dog, he was 'engaged' in the performance of his duties. When Hohman struck Wilson, it was 'on account of' that performance."

9. Protection under § 111 for those individuals who are not federal employees or officers but who are assaulted while assisting such officer or employee.
 - a. Courts have broadly interpreted the term "assisting such officer or employee" mentioned in § 1114.
 - b. In United States v. Murphy, 35 F.3d 143, 145 (4th Cir. 1994), the court held that a local jailor assisting the U.S. Marshal Service in the transfer of the defendant to another facility was afforded protection under §§ 111 and 1114. The court held that the common usage of the term "to assist" meant that the person was being used to help a federal agent, which was what happened in this case.
 - c. In United States v. Chun, 347 F.2d 717, 721 (4th Cir. 1965) the court held that a state agent on loan to the IRS and assisting federal agents is a federal officer for purposes of § 111.
 - d. In United States v. Matthews, 106 F.3d 1092, 1093 (2d Cir. 1997) the court expanded the definition of "assisting" to protect a handyman employed by a private company to install wallboard in a hotel that had been seized by the federal government in a civil forfeiture proceeding. The defendant, a tenant in the hotel, pulled a knife on one of the workers who, he thought, was installing the wallboard incorrectly. The court affirmed the defendant's conviction under § 111 holding that the

handyman “assisting” the Marshal’s service based on the government’s seizure of the hotel.

10. Knowledge and Intent: The Supreme Court has found that when enacting 18 U.S.C. 111 Congress intended to protect both federal officers and federal functions and insure a federal forum for the trial of offenses involving federal officers. United States v. Feola, 420 U.S. 671, 679, 683-84 (1975).
 - a. All that section 111 requires is an intent to assault, not an intent to assault a Federal officer—even where the officer is an undercover agent and the assailant is not aware the officer is a Federal officer. United States v. Feola, 420 U.S. 671 (1975).
 - b. The assault must be willful. In other words the defendant acted voluntarily and intentionally, and not by mistake or accident.
11. Penalties. 18 U.S.C. § 111 has three penalty tiers.
 - a. Simple assault, i.e., an attempt or threat to do bodily harm that does not involve an actual touching or a dangerous weapon is a misdemeanor punishable by up to one year imprisonment.
 - b. “All other cases” are felonies punishable by 8 years. These offenses involve contact but were not committed with a weapon and did not result in bodily injury.
 - c. 18 U.S.C. § 111(b) creates an enhanced penalty when a “deadly or dangerous weapon” is used or “bodily injury” results. The penalty for this offense is 20 years. In defining a dangerous weapon, the statute specifically includes “a weapon intended to cause death or danger but which fails to do so by reason of a defective component.” Almost any object which is used or attempted to be used in a way that can endanger life or inflict great bodily harm can be a dangerous weapon. United States v. Barber, 297 F. Supp. 917, 923 (D. Del. 1969) collected the following examples: “shoes on feet” can be a dangerous weapon, Medlin v. United States, 207 F.2d. 33 (D.C. Cir.

1953), as well as a "wine bottle," Thornton v. United States, 268 F.2d 583 (D.C. Cir. 1959), a "rake," Eagleston v. United States, 172 F.2d 194 (9th Cir. 1949), a "chair," United States v. Johnson, 324 F.2d 264 (4th Cir. 1963), a "brick," State v. Perry, 226 N.C. 530, 39 S.E. 2d 460 (1946), or a "chair leg," Wisniewski v. State, 51 Del. 84, 138 A.2d 333, 341-342 (1957). Other examples include the teeth of an HIV-positive inmate, United States v. Moore, 669 F.Supp. 289 (D.C. Minn. 1987), a defective zip gun, United States v. Gometz, 879 F.2d 256 (7th Cir. 1989), a patrol car door kicked into the shins of an MP by a handcuffed suspect, United States v. Sherwin, 271 F.3d 1231 (10th Cir. 2001), and a walking stick, (United States v. Loman, 551 F.2d 164 (7th Cir. 1977).

G. EPO#5: IDENTIFY THE ELEMENTS OF TITLE 18 U.S.C. § 201.

1. All citizens have a right to fair and ethical treatment by Federal employees. Additionally, federal employees and citizens must rely upon the honesty of those participating in official positions, such as judges, jurors and witnesses. The bribery statute, 18 U.S.C. § 201, is designed to punish corruption in the federal system.
2. To secure a conviction for bribery under 18 U.S.C. §201(b), the government must prove:
 - a. A corrupt offer or acceptance of something of value;
 - b. That such corrupt offer or acceptance was made to or by an officer of the United States, or person at the time acting for or on behalf of the United States in an official function; and
 - c. That the offer or acceptance was intended to influence the officer or person in the doing of some particular act or performance of some duty in the public official's official capacity.
3. Intent: "Bribery" under 18 U.S.C. §201 (b) requires proof of corrupt criminal intent. It is generally agreed that it involves a bad or evil purpose or motive.
4. EXAMPLES:
 - a. Defendant #1 offered Army Recruiter \$450 to

- keep Defendant #2 out of the service. Hurley v. United States, 192 F.2d 297 (4th Cir. 1951).
- b. Defendant gave money to a chief narcotics investigator to release him and give narcotics back. Hone Wu v. United States, 60 F.2d 189 (7th Cir. 1932).
5. 18 U.S.C. §201(c) deals with the lesser included offense of giving or receiving a gratuity. Proof of conduct under these subsections differs from that of bribery. United States v. Hsieh Hui Mei Chen, 754 F.2d 817 (9th Cir. 1985).
- a. Unlike bribery, there is no requirement of a "corrupt" offer or acceptance. Students may ask an instructor to clarify this difference between bribery and illegal gratuities. This distinction in criminal intent between the two offenses generally turns on circumstantial evidence and is often obscure in particular cases; hence, the issue is often sent to the jury. One commentator [Strader, Understanding White Collar Crime, § 8.03 (2002)] summarizes the case law with these observations. First, while bribery must involve a contemplated quid pro quo nexus between the bribe and the official act, this need not be proven to establish an illegal gratuity. Second, bribery necessarily begins with a scheme to influence future official action, while gratuity can be paid illegally even after the official act was already completed entirely uninfluenced by the later payment of the gratuity.
- b. The government must merely establish that something of value was given to a public official for or because of an official act performed or to be performed.
- c. Agency ethics officers can provide specific guidance regarding gratuities. Students should be advised that every agency has an office that can advise them about ethics rules including gratuities.
6. Other considerations in charging this offense:
- a. Both the person offering the bribe and the person who accepts it are culpable for the

offense.

- b. Title 18 U.S.C. §201(b)(2) is violated even though the official who is offered a bribe is not corrupted or the object of the bribe cannot be attained.
- c. United States v. Arroyo, 581 F.2d 649 (7th Cir. 1978). In order for the crime of bribery to be committed, it is not necessary that the public official actually have the power to perform the act that he promises in return for money. The public official must only represent that the money will be for the purpose of influencing the performance of some official act.
- d. The term "something of value" has been broadly construed. In United States v. Gorman, 807 F.2d 1299, 1304-1305 (6th Cir. 1986), the term included a loan and a promise of a job. The court, after finding that the defendant could not have gotten the loan from a bank and that the offered job included a substantial raise, concluded that these items had value sufficient to sustain an illegal gratuity conviction.

7. The definition of public official:

- a. "The term 'public official' means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror."
- b. Public official has been broadly construed by the courts to include persons selected to be public officials, and a number of other related persons. It is clear that state and local government employees who are administering federal programs qualify as public officials.
- c. The term "person who has been selected to be a public official" means any person who has

been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed.

- d. The statute also prohibits bribes or gratuities to persons who are former public officials (presumably because of any remaining official influence they might have).
- e. The statute also prohibits bribes or gratuities to witnesses for their testimony.
- f. The reach of federal prosecution into the activities of state and local officials administering federal funds was expanded by the Supreme Court in United States v. Dixon, 465 U.S. 482 (1984) and by Congress with the passage of 18 U.S.C. § 666, "Theft or bribery concerning programs receiving federal funds."

II. FEDERAL FIREARMS VIOLATIONS

A. RAPPORT AND OPENING STATEMENT

1. All law enforcement officers face the possibility of encountering firearms on the job. This course provides a basic introduction to selected federal firearms laws. There are many federal firearms laws which this course does not address. Likewise, this course does not address agency-specific officer concerns, such as the ability to carry off-duty, the ability to carry personal weapons, etc.
2. Many states and municipalities have firearms laws which are more restrictive than federal law. Federal law enforcement officers should acquaint themselves with the firearms laws applicable in their jurisdiction.
3. During this course students will learn that machine guns, sawed-off weapons, and other extremely dangerous weapons can be legally possessed if strict legal requirements are met. However, officer safety is a paramount concern. The officer should always take steps to insure his safety and the safety of others before investigating to see if a weapon is legally possessed.

B. ENABLING PERFORMANCE OBJECTIVES (EPO)

- EPO #6: Identify categories of individuals prohibited from possessing firearms.
- EPO #7: Identify procedures to initiate a firearms trace through the Bureau of Alcohol, Tobacco & Firearms.
- EPO #8: Identify the weapons listed in 18 U.S.C. §922(a)(4) which require registration with the Bureau of Alcohol, Tobacco & Firearms, and those weapons prohibited on a federal facility.

C. EPO #6: IDENTIFY CATEGORIES OF INDIVIDUALS PROHIBITED FROM POSSESSING FIREARMS.

1. A firearm is any weapon that will expel a projectile by explosive. This definition includes the frame or receiver of such weapon, a silencer or muffler, or any destructive device. 18 U.S.C. §921(a)(3). The definition does not include "antique" firearms (those manufactured prior to 1899), air-powered weapons like BB and pellet guns, black powder weapons and authentic replicas of antique firearms. 18 U.S.C. §921(a)(16).
2. Title 18 U.S.C. §922(g) prohibits certain individuals from knowingly [see 18 U.S.C. §924(a)(2)] "possessing in or affecting [interstate or foreign] commerce, any firearm or ammunition." Under 18 U.S.C. §922(g), it is unlawful for the following individuals to possess firearms.
 - a. anyone "who has been convicted in any court of a crime

punishable by imprisonment for a term exceeding one year.” This is referred to generically as a “convicted felon,” but does not include individuals convicted of:

- 1) a Federal or State offense pertaining to antitrust violations, unfair trade practices or similar offenses relating to the regulation of business practices, or
 - 2) “any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.” See 18 U.S.C. § 921(a)(20).
 - 3) “Any court” includes federal convictions, state convictions, and courts-martial. Foreign convictions are NOT included. Small v. United States, 125 S. Ct. 1752 (2005). This resolves an earlier split among the circuits regarding the issue of whether “any court” included foreign courts. Thus, even a foreign conviction punishable by imprisonment for a term exceeding one year cannot serve as a predicate offense for 18 U.S.C. § 922(g)(1).
- b. a “fugitive from justice”
- 1) meaning “any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding.” 18 U.S.C. § 921(a)(15)
- c. an unlawful user or addict of a controlled substance
- d. an individual who has been adjudicated a mental defective or who has been committed to a mental institution
- 1) Note that individual must have been “adjudicated” mentally defective or “committed” to an institution. Voluntarily seeking treatment does not make an individual prohibited.
 - 2) INSTRUCTOR NOTE: After the tragic events in April, 2007, at Virginia Tech [deranged student Cho kills 32 students and faculty and himself], Congress passed and the President signed into law the National Instant Criminal Background System [NICS] Improvement Amendments Act of 2007 (P.L. 110-180, Jan. 8, 2008) [See L-Drive - “1 Course Info – Basic Courses” “Federal Criminal Law” “Firearms”].

This law clarified (slightly) state (and federal) reporting requirements for this category and (more significantly) appropriated \$975,000,000 to states over the next 5 fiscal years to fund automated data collection and reporting systems to notify NICS of adjudicated mental defectives and those committed to a mental institution.

- e. an illegal alien or non-permanent resident alien, unless that alien has special permission to carry a firearm for hunting or sporting purposes or is authorized to carry a weapon as a foreign official. See 18 U.S.C. § 922(y)(2).
- f. an individual who has been dishonorably discharged from the Armed Forces
- g. anyone who has renounced his United States citizenship
- h. anyone subject to a court order restraining him from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner under these circumstances:
 - 1) there must have been a hearing for which the prohibited person received notice and a chance to participate;
 - 2) the restraining order must : (a) find the person a credible threat to physical safety of child or intimate partner, or (b) by its terms explicitly prohibit the use, attempted use, or threatened use of physical force against intimate partner or child that would be expected to cause injury,
- i. or, who has been convicted of a misdemeanor crime of domestic violence
 - 1) meaning a crime that “is a misdemeanor under Federal or State law” and “has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.” 18 U.S.C. §921(a)(33)(A)

- a) this provision is particularly controversial, since some law enforcement officers lost their jobs when this provision was added in 1996.
- 2) A person is not considered convicted of a disqualifying offense unless they had:
 - a) right to counsel, and
 - b) in a case in which they were entitled to a jury, the opportunity to have a jury or make a knowing and intelligent waiver of the right to jury. See 18 U.S.C. § 921(a)(33)(B).
- 3) In February 2009, the Supreme Court held [7-2] that the earlier domestic violence conviction [“predicate offense”] need not be for a crime that expressly contains as an element the domestic connection between assailant and victim. In 1994, Danny Hayes was convicted of misdemeanor battery in West Virginia. The woman he had beaten was his then-wife, the mother of his child and the woman with whom he lived. In 2004, officers, responding to a 911 call concerning domestic violence, went to the Hayes home. After Hayes consented to a search, the officers found a rifle. Other evidence was developed showing that Hayes had recently possessed other firearms as well. He appealed his conviction for three counts of possessing a firearm after being earlier convicted of a misdemeanor crime of domestic violence. The Supreme Court held that once the government had proven the domestic connection between Hayes and his victim in the 1994 misdemeanor battery conviction, he could be found guilty. United States v. Hayes, 129 S.Ct. 1079; 172 L.Ed. 2d 816; 2009 U.S. LEXIS 1634 (2009).
- 3. A person who receives a complete pardon or expungement of a felony or misdemeanor crime of domestic violence conviction is no longer considered convicted. However, if the pardon or expungement is qualified by the condition that the person may not possess firearms, then he is still prohibited from possessing firearms under federal law. See 18 U.S.C. § 921(a)(20) and 18 U.S.C. § 921(a)(33)(B)(ii).
- 4. INSTRUCTOR NOTE: Additionally, 18 U.S.C. §922(n) prohibits a person indicted for a crime punishable by imprisonment for more than one year from receiving, transporting or shipping a firearm.

NOTE: During the break, many students enjoy inspecting and dry-firing the weapons in the Display Kit. This is an excellent way to encourage student interest in the subject. The Instructor should encourage this practice.

D. EPO #7: IDENTIFY PROCEDURES TO INITIATE A FIREARMS TRACE THROUGH THE BUREAU OF ALCOHOL, TOBACCO & FIREARMS

1. The primary reason to trace a firearm through the Bureau of Alcohol, Tobacco & Firearms (ATF) is to connect a firearm to a specific suspect. An ATF trace should reveal the manufacturer, the importer if the weapon is foreign made, the wholesale distributor, the weapon dealer, and the first retail purchaser from the dealer. While possible, it is unlikely that subsequent transactions (either legal or illegal) were reported to ATF. Since many weapons used in criminal activity have been stolen and repeatedly changed hands, an ATF trace may provide relatively little information. However, it may provide leads to sources of weapons. For example, an ATF trace would indicate if an individual was legally buying a large number of guns in a state where they are readily available and transporting them for sale to an area where they are not available. Example: a criminal buying many guns in Georgia and takes them to New York City to sell illegally for profit.) Likewise, an individual possessing a stolen firearm might be linked to the theft of the firearm.
2. Gun manufacturers assign serial numbers to their firearms. The numbers themselves are not unique. It is quite possible that two different models of guns would have the same serial number. Therefore, the serial number alone is not enough to run a trace. In order to successfully run a trace, the ATF must be provided with the following:
 - a. Make
 - b. Model
 - c. Serial Number
 - d. Caliber or gauge
3. INSTRUCTOR NOTE: ATF started an internet-based tracing system in January 2005 called eTrace. Available to LEOs of participating agencies and departments, eTrace has reduced the average response time to 8 business days. The new system also supports generating statistical reports (e.g., average time-to-crime for firearms in a given location) and database queries to detect patterns and trends.

E. EPO #8: IDENTIFY THE WEAPONS LISTED IN TITLE 18 U.S.C. § 922(A)(4) WHICH REQUIRE REGISTRATION WITH THE BUREAU OF ALCOHOL, TOBACCO & FIREARMS AND THOSE WEAPONS PROHIBITED ON A FEDERAL FACILITY

1. Weapons requiring BATF registration. Certain weapons are not illegal per se, but must be registered with ATF for their possession to be legal. These include short-barrel shotguns, short-barrel rifles, machine guns, silencers/mufflers, and destructive devices.
 - a. A short-barrel shotgun is a shotgun having a barrel less than 18 inches in length or an overall length of less than 26 inches. 18 U.S.C. §921(a)(6).
 - b. A short-barrel rifle is a rifle having a barrel less than 16 inches in length or an overall length of less than 26 inches. 18 U.S.C. §921(a)(8).
 - c. A machine gun is any firearm that fires more than one bullet with a single trigger pull.
 - d. A silencer or muffler is any device used to silence or quiet the report of a firearm. 18 U.S.C. §921(a)(24). This is not limited to high-tech pieces of equipment, but could include common items such as oil filters, potatoes, and plastic 2-liter bottles filled with industrial foam.
 - e. Destructive devices include bombs, grenades, rockets (with more than 4 oz. of propellant), missiles (with explosive charge more than one-quarter ounce), mines, or similar devices. The term also includes firearms with a bore greater than .50 caliber [except conventional shotguns]. 18 U.S.C. §921(a)(4).
2. If an officer sees a weapon which requires registration with ATF, the officer should always exercise safety precautions first and worry about checking the registration second. If any of these weapons are encountered on the street, it is extremely likely they are illegally possessed. While such weapons might be lawfully possessed in a home or business, it is still highly likely that the owner has not complied with the strict ATF requirements for possessing such weapons.
3. INSTRUCTOR NOTE: 26 U.S.C. § 5861 prohibits possession of such unregistered weapons. That statute also prohibits transferring, receiving and making such a weapon. 26 U.S.C. § 5871 notes that such crimes are punishable by 10 years of imprisonment, and 26 U.S.C. § 5872 dictates forfeiture of such weapons and either their destruction, retention for federal purposes or resale to state or local governments.
4. Weapons prohibited in a federal facility. A "Federal facility" is "a

building or part thereof owned or leased by the Federal Government, where Federal employees are regularly present for the purpose of performing their official duties.” 18 U.S.C. §930(g)(1).

5. It is unlawful to knowingly bring a “dangerous weapon” onto a “Federal facility”. Dangerous weapons include: any “weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 1/2 inches in length.” 18 U.S.C. §930(g)(2). This is a very wide range of weapons. Law enforcement officers working on Federal facilities should understand that nearly any item which is used as a weapon or personal self-defense device is prohibited.
6. State, local and Federal law enforcement officers are exempt from this law while in the performance of their duties. However, many Federal facilities still require law enforcement officers to check their weapons. Law enforcement officers have no absolute right to carry their weapons on Federal facilities, and if required, must check their weapons.

III. ENTRAPMENT/FALSE STATEMENTS

A. RAPPORT AND OPENING STATEMENT

1. The goal of a criminal investigator is a successful prosecution. The entrapment defense precludes the conviction of an individual if it was the government who caused him to commit the crime. .
2. The Federal defense of entrapment poses two questions: (1) did the government induce the accused to commit the offense; (2) if so was the accused ready and willing without persuasion to commit the offense. On the first question the accused has the burden; on the second the government has it. The defendant is entitled to a jury instruction on entrapment if there is sufficient evidence from which a reasonable jury could find entrapment. Mathews v. United States, 485 U.S. 58 (1988).
3. While performing their duties, Federal officers frequently encounter individuals who give them false information. An individual making such a false statement is usually violating 18 U.S.C. § 1001. This statute can be an effective tool to punish the makers of material false statements.

INSTRUCTOR NOTE: False Statements, EPO #11, is also taught in the MBPTP and LMTP programs in conjunction with Theft/Embezzlement, EPO #24.

B. ENABLING PERFORMANCE OBJECTIVES (EPO)

EPO #9: Recognize when an inducement by the government is permitted or prohibited.

EPO #10: Recognize when predisposition negates an apparent entrapment defense.

EPO #11: Identify the elements of Title 18 U.S.C. § 1001.

C. EPO #9: RECOGNIZE WHEN AN INDUCEMENT BY THE GOVERNMENT IS PERMITTED OR PROHIBITED.

1. What is meant by "Entrapment"?

- a. Entrapment is the act of government officers or their agents (e.g., informants) inducing a person to commit a crime not contemplated by that person, for the purpose of prosecuting that individual.
- b. It is the conception and planning of an offense by officers or their agents and their procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer/agent. United States v. Russell, 411 U.S. 423 (1973).
- c. Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit the criminal act, and then induce commission of the crime so that the government may prosecute. Sorrells v. United States, 287 U.S. 435 (1932).
- d. Sentencing entrapment occurs when a defendant who lacks a predisposition to engage in more serious crime nevertheless does so "as a result of 'unrelenting government persistence.'" United States v. Veazey, 491 F.3d 700, 710 (7th Cir. 2007), quoting, United States v. Hale, 448 F.3d 971, 989 (7th Cir. 2006), cert. denied, 127 S.Ct. 1020, 166 L.Ed. 2d 783 (2007). To overcome this argument, the government need not explain or defend its motives, but must show only that the defendant was in fact predisposed to violate the law without "extraordinary inducements." United States v. White, 519 F.3d 342 (7th Cir. 2008).

2. The Entrapment Defense

- a. Entrapment is an "affirmative" defense. The defendant is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find

entrapment. The question of entrapment is one for the jury, rather than for the judge. Mathews v. United States, 485 U.S. 58 (1988).

- b. The Supreme Court has held that even if the defendant denies one or more elements of the charge he is still entitled to the entrapment instruction if there is sufficient evidence from which a reasonable jury could find entrapment. Mathews v. United States, 485 U.S. 58 (1988).
- c. Thus, a defendant can raise entrapment even if this is inconsistent with his other defenses. Mathews v. United States, 485 U.S. 58 (1988).

3. Views of Entrapment

- a. Objective view: the emphasis is on police conduct rather than the defendant's state of mind.
- b. Subjective view: the critical factor in the entrapment equation is the state of mind of the defendant. At issue is the defendant's predisposition to commit the offense charged. The question is whether the defendant, before contact with law enforcement officers or their agents, already possessed the state of mind to commit the offense charged. Once the defendant has raised the entrapment defense, the prosecution must negate it by establishing predisposition beyond a reasonable doubt. United States v. Navarro, 737 F.2d 625, 635 (7th Cir. 1984), cert. denied, 469 U.S. 1020 (1984). If defendant's predisposition is established, she would not be entrapped. Sorrells v. United States, 287 U.S. 435 (1932). The court in Sorrells barely upheld the subjective view. Twenty-six years later the Supreme Court upheld the subjective view and criticized the objective view as being unduly restrictive upon the prosecution. Sherman v. United States, 356 U.S. 369 (1958). The Supreme Court established the subjective view as the correct one to be used in all Federal Courts. Hampton v. U.S., 425 U.S. 484 (1976). INSTRUCTOR NOTE: Sorrells and Sherman, were 5-4 decisions and Hampton was a 5-3 decision.

4. Due Process Argument (Objective Entrapment)

- a. Some lower courts have observed that government conduct can be so outrageous that due process principles would absolutely bar the Government from obtaining a conviction. United States v. Twigg, 588 F.2d 373 (3rd Cir. 1978); United States v. Cuervelo, 949 F.2d 559 (2d Cir. 1991) (sex with defendant can rise to outrageous government conduct);

United States v. Russell, 459 F.2d 671 (9th Cir.1972) (government supplies precursor drug not available to the public). For a defendant to establish outrageous government conduct sufficient to support dismissal of an indictment, there must be government over-involvement combined with a passive role by the defendant. United States v. Carriles, 541 F.3d 344 (5th Cir. 2008). In United States v. Chisum, 312 F.Supp. 1307 (C.D.Cal. 1970), the indictment was dismissed when the defendant was supplied counterfeit currency by a government agent and then indicted for receiving counterfeit currency with the intent to pass as genuine.

- b. For example, threatening to injure the children of a target unless he committed a crime would cross this line and violate the Due Process Clause. Even if the target were predisposed to commit the crime, the Government's behavior would render the case non-prosecutable. If a prosecutor were foolish enough to proceed, the behavior would almost certainly lead to acquittal and a grave loss of public confidence in federal law enforcement. Obviously, such outrageous tactics are neither planned nor executed by professional federal law enforcement officers. But inadequately-controlled informants and other agents of the government can generate the grounds for this defense if their methods to develop cases become outrageously overzealous.

5. Inducement

- a. In general:
 - 1) There is a split of authority among the Circuits as to the amount of pressure that must be exerted by the government to form the basis for a properly supported entrapment instruction.
 - 2) Without some evidence of pressure exerted by the government, no instruction on the defense need be given.
- b. The Second Circuit defines inducement as "soliciting, proposing, initiating, preaching, or suggesting the commission of the offense charged. United States v. Dunn, 779 F.2d 157,158 (2d Cir.1985) *quoting* United States v. Sherman, 200 F.2d 880,883 (2d Cir.1952) (L.Hand, J). Inducement refers to "the government's initiation of the crime and not to the degree of pressure exerted." United States v.

Riley, 363 F.2d 955, 958 (2d Cir. 1966).

- c. The First Circuit rejected this definition by distinguishing between solicitation and inducement. Mere solicitation would fail to meet the threshold criterion requiring the government to establish predisposition. Inducement requires evidence that shows the defendant was not ready to commit the crime charged. The Tenth Circuit also appears to require more than initiation or solicitation. At the far end of the spectrum, the Eleventh Circuit has held that the defendant must demonstrate not merely inducement or suggestion but an element of persuasion or mild coercion. United States v. Andrews, 765 F.2d 1491, 1499 (11th Cir.1985).
 - d. If there is sufficient evidence of inducement to warrant an instruction, then the government must establish that the defendant was predisposed to commit the offense charged beyond a reasonable doubt. The sole issue would be whether the government carried its burden of proving the defendant was predisposed to violate the law *before* the government intervened. Jacobson v. United States, 503 U.S. 540 (1992).
 - e. Inducement by law enforcement officers may take many forms including persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based upon need, sympathy or friendship.
6. Permitted Inducements. Some inducements are unlikely to tempt a law-abiding person to commit a crime. Such inducements are so mild that courts generally condone their use. Some examples:
- a. Use of deception: United States v. Engler, 806 F.2d 425 (3d Cir. 1986).
 - b. Use of decoys (e.g., metal deer to catch poachers).
 - c. Payment of reasonable amount of money. Note that in the ABSCAM cases a \$50,000 bribe was held to be reasonable as was a proposed \$70,000 profit for Senator Williams.
 - d. Assistance in facilitating the commission of the crime by providing equipment or supplies (e.g., paper for counterfeiting) or products (e.g., chemical for drug manufacture).
7. "Prohibited" inducements. Some inducements are so coercive that their use jeopardizes any chance of successful prosecution. These may create at least the appearance-- and sometimes the reality-- of outright duress. Threats against the well-being of the target's family in order to

convince the target to agree to the proposed commission of a crime are one example. Other examples include:

- a. Extreme appeals to the sympathy or emotions of the person solicited. The Sherman case, taken to extremes, suggests an example.
 - b. Offers of substantial, unreasonable amounts of money to an impoverished or financially desperate target. United States v. Dion, 762 F.2d 674 (8th Cir. 1985).
 - c. Continual pressure on the target, such as repeated phone calls, visits, requests, etc.
 - d. Repeated insistence, badgering or soliciting. Jacobson v. United States, 503 U.S. 540 (1992).
 - e. Violent demonstrations, threats, and animal cruelty. United States v. Skarie, 971 F.2d 317 (9th Cir. 1992) (impaling live chicken).
8. Inducements by middlemen and informants:
- a. Private Inducement: Entrapment occurs only when the criminal conduct was the product of the activity of law enforcement officials. This means that entrapment cannot result from the inducements of a private citizen but must be the product of conduct by governmental agents.
 - b. Inducements offered by Government Informers: On the other hand, when non-Government persons are recruited and then targeted against suspects by LEO, their activities will amount to Government inducement. In some cases, the private party is clearly an "agent" of the Government. Sometimes, however, the relationship between LEO and private parties is hazy. Whether the private party's activities constitute government inducement in such cases will depend on factors like:
 - 1) The extent of direction and supervision provided by LEO to the private party's actions.
 - 2) The degree to which targets are pre-selected by LEO.
 - 3) The history of similar prior operations by the private party and LEO.
 - 4) The extent to which operational resources are made available to the private party by LEO.
 - 5) The degree to which a successful operation results in some tangible reward to the private party from LEO.

D. EPO #10: DETERMINE WHEN PREDISPOSITION NEGATES AN APPARENT ENTRAPMENT DEFENSE.

1. Predisposition in general:

- a. Where a person already has a readiness and willingness to break the law, the mere fact that government agents provide what appears to be a favorable opportunity is not entrapment.
- b. By predisposed, it is not meant that the defendant on his own, under some conceivable set of circumstances, might commit the crime, but that he is presently ready and willing to commit the crime. Predisposition is a state of mind that readily responds to the opportunity furnished by the officer or his agent to commit the forbidden act for which the accused is charged.
- c. If there is evidence of inducement considered sufficient to warrant an instruction, then the government must establish that the defendant was predisposed to commit the offense charged beyond a reasonable doubt. The sole issue would be whether the government carried its burden of proving the defendant was predisposed to violate the law *before* the government intervened. Jacobson v. United States, 503 U.S. 540 (1992).
- d. Use of other crimes evidence. Generally, evidence of earlier crimes or wrongdoing by the defendant is inadmissible in his criminal trial. Rule 404(a) F.R.E..
 - 1) But Rule 404(b) allows the use of evidence of "other crimes or acts" to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Courts have stated that the government may use such evidence to show predisposition.
- e. Use of Prior Convictions / Prior Arrests / Prior Criminal Activity:
 - 1) The courts have permitted the use of prior criminal activity in order to prove the predisposition of the defendant to commit the charged offense.
 - 2) Proof of prior illegal conduct is relevant to the issue of a defendant's predisposition to commit a crime. The issue is whether the defendant's involvement in a prior criminal act is sufficiently similar to the act charged in the indictment. If this requirement has

been satisfied, then past acts leading up to the criminal activity are admissible to show knowledge, motive, and intent on the part of the defendant to participate in the crime charged.

f. Use of Post-Crime Criminal Activity:

- 1) Predisposition rests on a defendant's mental state prior to commission of the crime. But that mental state can be shown by what the defendant did or said either before or after commission of the crime charged. Thus, evidence of continued drug dealing by a defendant after his indictment for earlier drug deals was admissible to prove his predisposition once he contended that he had been entrapped.... United States v. Moschiano, 695 F.2d 236, 243-244. (7th Cir. 1982).
- 2) A statement made by the defendant to an undercover agent that he would be willing to get more drugs for the agent ("if you need more I'll be here") was admissible to show his predisposition. United States v. Jenkins, 480 F.2d 1198, 1200 (5th Cir. 1973), cert. denied, 414 U.S. 913 (1973).
- 3) "The primary thrust of these authorities is that evidence of a similar offense, committed in close proximity of time, may be corroborative of a prior or subsequent offense. Although evidence introduced in a criminal trial generally should relate only to the specific offense charged, prior or subsequent incidents may be introduced to establish that a defendant possessed the requisite knowledge or that there is a consistent pattern, scheme of operations, or similarity of method." United States v. Rodriguez, 474 F.2d 587, 590 (5th Cir. 1973).
- 4) "The question in each case is not whether the events at issue occurred before, during or after commission of the alleged offense. The question is whether the events are relevant to and probative of the defendant's willingness to commit the crime charged when first solicited to do so by a government agent." United States v. Brown, 567 F.2d 119, 120 (D.C. Cir. 1977).

g. Use of Statements to establish predisposition:

- 1) Conversations with the defendant can be very

important during an undercover investigation in proving his predisposition. Whenever possible, encourage the defendant to talk or brag about his criminal enterprise.

- 2) In United States v. Hill, 626 F.2d 1301, 1302 (5th Cir. 1980), Hill boasted to the undercover agent "of his long-time involvement in procuring and selling stolen vehicles, of the quality of his wares, and the reliability of his operation, and of his past success in avoiding prosecution."

h. Defendant's ready acceptance:

- 1) Courts have placed heavy emphasis on the defendant's ready acceptance of the offered inducement. In United States v. Reynoso-Ulloa, 548 F.2d 1329, 1336 (9th Cir. 1977) the court said "...while none of the factors alone indicates either the presence or absence of predisposition, the most important factor...is whether the defendant evidenced reluctance to engage in criminal activity which was overcome by repeated Government inducement."
- 2) In other cases, the defendant's predisposition was proven by:
 - a) an "unbridled enthusiasm for his "new career". United States v. Anderton, 679 F.2d 1199, 1201 (5th Cir. 1982).
 - b) "I'm no Boy Scout." United States v. Myers, 692 F.2d 823, 836 (2d Cir. 1982) (one of the Abscam cases).
- 3) A "ready response" reveals that the defendant was a willing participant and not one that had merely succumbed to the seduction of the LEO's inducement.

E. EPO #11: IDENTIFY WHEN A FALSE STATEMENT VIOLATES TITLE 18 U.S.C. § 1001.

1. The Statute. Title 18 U.S.C. § 1001 provides as follows:
 - a. Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
 - 1) falsifies, conceals, or covers up by any trick, scheme,

or device a material fact;

- 2) makes any materially false, fictitious, or fraudulent statement or representation; or
- 3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than five years or, if the offense involves international or domestic terrorism, fined or imprisoned 8 years, or both.

- b. Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.
 - c. With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to...
 - 1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or
 - 2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.
2. Elements of Title 18 U.S.C. § 1001. The following elements must be proven in order to establish that a violation of § 1001 has occurred:
- a. Whoever ...
 - b. Regarding certain Federal matters...
 - c. Knowingly and willfully...
 - d. Makes a false material statement, or makes or uses a false writing or document knowing it to contain a material false statement, or conceals or covers up a material fact...
- shall be fined/imprisoned up to five years.*
3. "Regarding Certain Federal Matters." False statements (oral or written), whether or not legally required to be made, which are made in a matter within the jurisdiction of the executive, legislative, or judicial branches of the United States are violations of § 1001. United States v. Arcadipane,

41 F.3d 1 (1st Cir. 1994). Courts have also upheld convictions under this section where individuals have made false statements to state agencies that are recipients of Federal funds.

- a. The False Statements Accountability Act of 1996. Title 18 U.S.C. § 1001 applies to all three branches of the Federal government. In Hubbard v. United States, 514 U.S. 695 (1995), the Supreme Court had held that a Federal court was neither a “department,” nor an “agency,” within the meaning of § 1001. The Court also noted that these terms applied to Executive Branch agencies alone, as was originally intended. However, the 1996 Act overruled the Court’s interpretation in Hubbard, with the following limitations:
 - 1) That section (a) of the Act does not apply to a party or their counsel during a judicial proceeding for any statements, representations, writings or documents submitted by them to a judge or magistrate in that proceeding. Thus, non-parties could still be prosecuted for false statements made during a judicial proceeding, as could a party for false submissions made during administrative housekeeping matters, such as submissions to the Office of Probation, bar membership admissions or other judicial entities (the Clerk of the Court, for example).
 - 2) That section (a) of the Act shall apply to matters within the jurisdiction of the legislative branch only if they relate to administrative matters or congressional investigations conducted consistent with applicable congressional rules.
- b. Administrative matters would include such things as financial disclosure filings, claims to the House Finance Office, and submissions to other legislative entities, such as the General Accounting Office, the Government Printing Office, the Library of Congress, the Office of the Inspector General of the House and the Capitol Police.
- c. Duly authorized investigations or reviews are those activities initiated through a formal action of a House or Senate committee, or the whole House or Senate. Inquiries by members of Congress or their staff would not be a duly authorized investigation under § 1001.
- d. Examples. The following examples are provided for illustrative purposes.

- 1) United States v. Sheets, 65 F.3d 752 (8th Cir. 1995). Following an on-the-job dispute with fellow employee Quinn Hancock, Sheets filed a false amended tax return in Hancock's name. The amended return reported \$390,000 in unreported gambling revenue, which subjected Hancock to an additional tax liability of \$103,697.90. After Hancock eventually convinced the IRS that the claim was bogus, the IRS focused on Sheets. Sheets denied filing the amended tax return, furnished a disguised handwriting sample, and altered the typewriter he used to type the return before turning it over to the police. Sheets pled guilty to a two-count indictment for his false statements to the IRS.
- 2) United States v. Haggard, 41 F.3d 1320 (9th Cir. 1994). Several years after an 8-year-old girl was abducted near her home in Hayward, California, Haggard contacted the FBI and claimed to know of the location of her body and the identity of her assailant. Haggard was serving time in Indiana for burglary. During several interviews with the FBI, Haggard recounted his story, and the FBI declined to pursue the case. Upset, Haggard wrote to the *San Francisco Chronicle*, claiming to know the location of her body, her assailant's identity, and wanting to put the child's parents at ease and allow them to give the child a proper burial. The FBI called his bluff, and brought him to testify before a grand jury. The next day, Haggard led the FBI on a 4-hour, 100-mile wild goose chase around the Bay area. At the end of the trip, Haggard admitted he made the whole thing up, purportedly to seek favorable treatment with the Indiana Parole Board. As expected, when his hoax was revealed, the impact on the family of the missing girl was traumatic. After being indicted on 11 Federal counts, Haggard pleaded guilty to obstructing an FBI investigation, two counts of false statements to the FBI, obstructing justice by giving false testimony to a grand jury, and two counts of false statements to a grand jury. He received 78 months imprisonment, and a nominal fine and restitution.
- 3) United States v. Massey, 550 F.2d 300 (5th Cir. 1977). The defendant called the FBI on the telephone and later met with an agent. Massey told the agent that he knew of a plot to kill President Ford and

Senator Ted Kennedy. The information was unsworn, oral and unrecorded. The FBI commenced an investigation and later discovered that Massey had lied. He was convicted of violating § 1001.

- 4) United States v. Lambert, 501 F.2d 943 (5th Cir. 1974)(en banc), abrogated by United States v. Rodriguez-Rios, 14 F.3d 1040 (5th Cir. 1994)(en banc) as to “exculpatory no” doctrine. Lambert visited the Tampa FBI office and signed a written statement falsely stating that two Tampa Police Officers had arrested him without probable cause and had physically abused him. The FBI conducted an investigation and discovered the charge was an attempt to get back at the officers for his arrest. He was convicted of violating § 1001.
 - 5) United States v. Adler, 380 F.2d 917 (2d Cir. 1967), cert. denied, 389 U.S. 1006 (1967). The defendant, a contractor at a Navy submarine base, voluntarily visited the FBI and orally stated that government officials were bribing him. The FBI commenced an investigation and later discovered, and Adler admitted, that he had falsely incriminated the government officials because the officials were too tough on him. He was convicted of violating § 1001.
 - 6) United States v. Herring, 916 F.2d 1543 (11th Cir. 1990). The defendant falsely applied for and received unemployment benefits from Georgia. He claimed the federal government lacked jurisdiction to prosecute under § 1001. Georgia received federal dollars to help pay the administrative costs of its unemployment program and the program was overseen by the U.S. Secretary of Labor. Therefore, jurisdiction was appropriate and the defendant’s conviction upheld.
4. Statements Regarding Criminal Acts. False statements made to a Federal agency by a “witness/informant” about alleged criminal acts are within the jurisdiction of the agency.
- a. United States v. Shanks, 608 F.2d 73 (2d Cir. 1979), cert. denied, 444 U.S. 1048 (1980). An employee (the eventual defendant) made deliberate false statements to investigators that briefly focused Secret Service attention on an innocent employee.
 - b. Sica v. United States, 325 F.2d 831 (9th Cir. 1963), cert. denied, 376 U.S. 952 (1964). The IRS was investigating the

tax liability of Cohen, who was involved in the cigarette vending machine business in the Los Angeles area. There was stiff competition between the vending machine companies. The IRS was able to prove that Cohen gave Sica \$5,000 in cash for his services in locating sites for the vending machines. The IRS interviewed Sica and informed him it was investigating Cohen. Sica denied in writing that he had ever accepted money from Cohen. Sica was later convicted of violating § 1001. Also, note the similarity between this violation by a witness and a violation of Title 18 U.S.C. § 4 (Misprision of Felony). The defendant gave a written false statement to the FBI intended to conceal her husband's participation in a bank robbery. United States v. Pittman, 527 F.2d 444 (4th Cir. 1975), cert. denied, 424 U.S. 923 (1976).

5. Statements Regarding Regulatory Functions. False statements made to an agency regarding the regulatory functions of a Federal department or agency.
 - a. United States v. Seay, 718 F.2d 1279 (4th Cir. 1983), cert. denied, 467 U.S. 1226 (1984). The defendant's husband died in 1950 while on active duty with the U.S. Army. She received benefits from the FECA (Federal Employees Compensation Act) for herself and four children. The defendant received forms stating that she would receive compensation as a widower until she died or remarried. In 1962, she moved in with Mr. Coke Seay and they lived together for 19 years. During that time, she changed her church membership and they both joined the same church as Mr. and Mrs. Coke Seay. They appeared in the church pictorial directory as "Mr. and Mrs. Coke Seay." The minister later testified at trial that the church members considered them to be married. Each year the Department of Labor sent the defendant a form, which she signed and failed to mention she was married. When the defendant discovered she was being investigated for making false statements, she moved out of Coke Seay's house and rejoined her old church. At trial the government was able to prove, that they were married under the common law and therefore she had lied on the forms sent to her by a Federal agency. She was convicted of violating § 1001.
 - b. United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991). Poindexter was convicted on five felony counts based on the part he played as National Security Advisor in the "Iran/Contra" affair. During his one year in that position,

Poindexter made assurances that national policy was in accordance with the House Resolution concerning National Security Council assistance to the Contras, while the opposite was true. He also arranged for Oliver North to testify to those assurances and destroyed a Presidential "finding" that authorized the exchange of missiles to Iran in return for the release of hostages. He also falsely testified before the House Intelligence Committee concerning his knowledge of the missile shipments from Israel to Iran. The convictions were eventually overturned based on the immunity issues arising from his and Oliver North's testimony before the Congress United States v. North, 910 F.2d 843 (North I), *modified*, 920 F.2d 940 (D.C. Cir. 1990)(North II), cert. denied, 500 U.S. 941 (1991).

6. Knowingly and Willfully – Intent. To be a violation under § 1001, the statement must be one that is capable of affecting the exercise of a governmental function. The intent must be to deceive or to mislead and done knowingly and willfully. It is not required that the intent be to defraud. Examples include:
 - a. False certifications to GSA for nonconforming plastic bags. Company president ordered employees to short GSA, but did not personally sign certification statements. United States v. Fairchild, 990 F.2d 1139 (9th Cir. 1993), cert. denied, 510 U.S. 898 (1993).
 - b. False statements and documents sent to the IRS concerning a fraudulent land transaction were not spontaneous, emotional disclaimers, but were calculated and deliberately intended to influence the IRS; and if Duerr had not provided the information concerning the land transactions, the IRS would not have pursued the issue. United States v. Steele, 933 F.2d 1313 (6th Cir. 1991), cert. denied, 502 U.S. 909 (1991).
 - c. Accountant produced and gave to IRS auditor a charitable deduction he stated he had failed to file in previous tax year. Deduction was later proved false. United States v. Fern, 696 F.2d 1269 (11th Cir. 1983).
 - d. A defendant who deliberately avoids reading a form he is signing cannot avoid criminal prosecution for false statements contained on the form. By signing the form and not reading it the defendant acted with "reckless disregard of the truth," which has been held to satisfy the requirement of § 1001. United States v. Puente, 982 F.2d 156 (5th Cir. 1993).

7. Makes a False Material Statement or Conceals or Covers up a Material Fact. The false statement made by the defendant must be "material." The materiality of a statement is a mixed question of law and fact, and is one that should be decided by the jury. As described by the Supreme Court:

"[T]he statement must have a natural tendency to *influence, or be capable of influencing, the decision of the decision-making body to which it was addressed*. The Constitution gives the criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged. The trial judge's refusal to allow the jury to pass on the 'materiality' of Gaudin's false statements infringed that right." United States v. Gaudin, 515 U.S. 506 (1995).

- a. Oath or Affirmation. Under § 1001, a false statement is not required to be under oath or affirmation. See United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991).
- b. Form of the Statement. The false statement can be oral or written.
 - 1) United States v. Moore, 27 F.3d 969 (4th Cir. 1994). Federal agents were investigating bank fraud by Moore and others. Moore was being interviewed by an FBI agent, a postal inspector, and two Assistant U.S. Attorneys where he denied his part in the preparation of false tax returns used by his client to obtain bank loans. Moore not only denied preparing the documents, but went on to say that he had not prepared any tax forms for the client, denied the handwriting on the form was his, but admitted the handwriting was similar to his. Moore then stated that he had never used the type of form that was being questioned.
 - 2) United States v. Barr, 963 F.2d 641 (3rd Cir. 1992). Barr served as an Assistant to the Attorney General in Washington, D.C. for nine months. On Barr's SF-171 and SF-86, he answered "no" to questions concerning the use or possession of marijuana, narcotics, hallucinogenic, or other dangerous or illegal drugs. He was interviewed by the FBI as part of the security clearance procedure. After Barr resigned from his position, it was learned that Barr had used cocaine several times during the time period he had answered "no" to use of drugs in the SF-171, SF-86, and the FBI interview. He had also used cocaine while employed

with the Attorney General. Barr was convicted of false statements and drug possession.

- 3) United States v. Berisha, 925 F.2d 791 (5th Cir. 1991). Berisha was preparing to board an international flight from Dallas - Ft. Worth when a customs inspector approached him and asked him if he was carrying more than \$10,000. Berisha twice stated he only had \$8,000 with him. The inspector later observed Berisha attempt to pass a roll of currency to a companion. The total amount of currency possessed by Berisha was over \$17,000. He was convicted of failing to report the currency and false statements.

8. The "Exculpatory No." At one time, some circuits held that false "exculpatory no" statements made by a suspect to agents in a criminal investigation were not a violation of § 1001. An "exculpatory no" statement is a statement in which the suspect merely denies that he is guilty of the crime in which he is a suspect. Even if the statement was untrue (i.e., he did in fact commit the criminal act), such a statement could not be charged under § 1001. The leading decision of the "exculpatory no" doctrine originated from the Fifth Circuit in Paternostro v. United States, 311 F.2d 298 (5th Cir. 1962), abrogated by United States v. Rodriguez-Rios, 14 F.3d 1040 (5th Cir. 1994)(en banc). Nevertheless, the United States Supreme Court put the "exculpatory no" issue to rest when it decided United States v. Brogan, 522 U.S. 398 (1998). In Brogan, the Court held that the plain language of § 1001 did not support any exception for an "exculpatory no" statement. The Court made it clear that, "[b]y its terms, § 1001 covers 'any' false statement...of whatever kind...including the use of the word 'no' in response to a question." Justice Scalia emphasized that "...the Fifth Amendment does not confer a privilege to lie," language that had been used by the Fifth Circuit in Rodriguez-Rios.

- a. False "exculpatory no" statements made regarding an administrative or regulatory investigation never fell within the exception to §1001. False statements made to Federal investigators that relate to Federal regulatory functions of a department or agency can form the basis for Federal prosecution under § 1001. See United States v. Barr, 963 F.2d 641 (3rd Cir. 1992)(false entries on SF-171 and SF-86 for employment), and United States v. Berisha, 925 F.2d 791 (5th Cir. 1991)(false entry on Customs currency reporting form).
- b. Congress addressed the "false exculpatory no" doctrine in the False Statements Accountability Act of 1996, by implicitly

applying the doctrine in judicial proceedings where statements and other submissions to the court are made by the defendant or defendant's counsel. The Department of Justice was concerned that adding any other proviso ending or extending the doctrine might delay the rest of the Act's passage and invite new judicial interpretation.

9. Miscellaneous Statutes Related to § 1001:

- a. Title 2 U.S.C. § 192 (Contempt of Congress).
- b. Title 18 U.S.C. § 4 (Misprision of Felony).
- c. Title 18 U.S.C. § 287 (False, Fictitious or Fraudulent Claims).
- d. Title 18 U.S.C. § 1002 (Possession of False Papers to Defraud the United States).
- e. Title 18 U.S.C. § 1005 (Bank Entries, Reports and Transactions).
- f. Title 18 U.S.C. § 1015 (Naturalization, Citizenship, or Alien Registry).
- g. Title 18 U.S.C. § 1505 (Obstruction of Proceedings Before Departments, Agencies, and Committees).
- h. Title 18 U.S.C. § 1621 (Perjury).
- i. Title 18 U.S.C. § 1622 (Subornation of Perjury).
- j. Title 18 U.S.C. § 1623 (False Declarations Before Grand Jury or Court).
- k. If the false statement violates § 1001 and another statute [e.g., Title 26 U.S.C. § 7207 (False Statements to an IRS Agent)], the prosecutor may choose § 1001, even if the penalties are more severe.

IV. CONSPIRACY / PARTIES

A. RAPPORT AND OPENING STATEMENT

1. There are various conspiracy statutes in the United States Code (U.S.C.), but this course covers only the general criminal conspiracy statute, codified at Title 18 U.S.C. § 371.
2. The Supreme Court has often referred to the crime of conspiracy as “a partnership in crime.” United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150 (1940). As such, each conspirator, like a business partnership, is liable for virtually all acts and admissions of any co-conspirators.
3. The crime of conspiracy was created because of the inherent dangers posed to society when two or more individuals deliberately plot to violate the law. The Supreme Court has remarked on the dangers of a criminal conspiracy:

“It involves the deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.” United States v. Rabinowich, 238 U.S. 78 (1915).
4. The general approach to conducting a conspiracy investigation is to identify the members within the organization along with their respective roles for achieving the criminal objectives. Criminals attempt to conceal their plans and avoid detection so recruiting and developing witnesses is critical to any conspiracy investigation. Investigators will need to locate and obtain evidence to corroborate witnesses and support the theory of the case that the defendants were acting together in agreement, toward a common criminal objective.
5. A person who commits a crime is called the “principal” of the offense. However, a crime may involve persons who assist the one who actually performed the criminal act. Additionally, the Federal statute pertaining to “Principals” (Title 18 U.S.C. § 2) contains a subsection concerning those who “cause” a crime to be committed. Still others may be involved in assisting the principal in some manner after the crime has been committed. These individuals are referred to as “accessories after the fact.” Finally, other individuals may have knowledge of a Federal crime, and commit an act that “conceals” the true nature of the crime. These individuals may be guilty of “misprision of felony.”
6. The General Federal Conspiracy Statute. Title 18 U.S.C. § 371 reads as follows:
 - a. “If two or more persons conspire either to commit any

offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

- b. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

7. The Importance of the Statute. Title 18 U.S.C. § 371 is a valuable tool for criminal investigators, and can often be used to great advantage.

- a. Pro-Active. Because the statute is pro-active in nature, criminals can be apprehended prior to any substantive criminal offense being committed (e.g., before the bank robbery attempt). United States v. Feola, 420 U.S. 671 (1975).
- b. Peripheral Helpers. Under the conspiracy statute, persons who could not be convicted as a principal under 18 U.S.C. § 2 (because a crime was never actually consummated) may still be caught in the web of a conspiracy.
- c. Insulated Leaders. In many criminal organizations, the leaders insulate themselves from those members whose actions are more visible, thus making them less likely to get caught. The law of conspiracy provides a method to reach beyond the visible layer and immobilize the entire organization.
- d. Doctrine of Merger. The conspiracy to commit a crime is a separate and distinct offense from the crime being planned and does not merge with any completed crime. Pinkerton v. United States, 328 U.S. 640 (1946). Accordingly, a defendant may be convicted and sentenced both for conspiracy to commit a crime and for the substantive crime itself. Even if the same act established the facts for both offenses, it is not double jeopardy.
- e. Inconsistent Verdicts. The law recognizes that inconsistent verdicts are often returned in criminal cases. The crime of conspiracy increases the chance that a defendant will be convicted of at least one charge. Thus, even when a defendant is acquitted of the substantive crime, he or she may still be convicted of the conspiracy charge. United States v. Hughes Aircraft Co., 20 F.3d 974 (9th Cir.), cert. denied, 513 U.S. 987 (1994). Alternatively, an individual

may be convicted of the substantive offense, but acquitted of the conspiracy charge. United States v. Stevens, 909 F.2d 431 (11th Cir. 1990).

8. The Elements of Conspiracy. The crime of conspiracy under Title 18 U.S.C. § 371 has five (5) elements.
 - a. Two or More Persons ...
 - b. Intentionally ...
 - c. Agree ...
 - d. To Violate Federal Law or Defraud the United States Government ... and
 - e. Commit An Overt Act In Furtherance Thereof.
9. Completion of the Conspiracy. When all of the above elements are present, the conspiracy is said to be COMPLETE. This does not mean that the conspiracy is finished, only that all the elements for a chargeable offense are now present.

B. ENABLING PERFORMANCE OBJECTIVES (EPO)

- EPO #12: Identify how many persons are needed to form a conspiracy.
- EPO #13: Identify when knowledge and intent are sufficient to constitute a conspiracy.
- EPO #14: Recognize an agreement and its functions according to the provisions of Title 18 U.S.C. § 371.
- EPO #15: Recognize the function of an overt act in the crime of conspiracy.
- EPO #16: Identify when a co-conspirator's statement may be used during the prosecution of a conspiracy.
- EPO #17: Identify the limits of the withdrawer's or late joiner's criminal liability.
- EPO #18: Identify when a person may be prosecuted for assisting another in the commission of a crime, in accordance with Title 18 U.S.C. §§ 2-4.

C. EPO #12: IDENTIFY HOW MANY PERSONS ARE NEEDED TO FORM A CONSPIRACY

1. Two or More Persons. The plain language of Title 18 U.S.C. § 371 requires the participation of "two or more persons." The more difficult question to be answered is not how many persons are required for the crime, but who can those persons be. When investigating a conspiracy case, it is particularly important to know who cannot be considered to

be a conspirator to complete the two person requirement.

- a. Undercover Agents. Under § 371, an agreement between only two persons, one of whom is an undercover government agent, cannot support a conspiracy conviction, in that the requisite plurality is not present. United States v. Pennell, 737 F.2d 521 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985).
- b. Confidential Informants. Informants working for the government are considered as an extension of the government, and, like undercover agents, cannot be counted as a person to satisfy the two-person requirement. An agreement between the defendant and at least one other non-government affiliated party must be proved.
- c. Partnerships. Unlike corporations, a partnership may not be named in the indictment as a conspirator, even where the conspiracy was intended to benefit the partnership. Nonetheless, the individual partners may be indicted for their participation in the conspiracy.

In addition, there are several categories of individuals who may or may not be considered as one of the necessary two or more persons.

- d. Mentally Ill Persons. Similar to undercover agents, if a mentally ill individual is not capable of forming the requisite intent to commit the crime, they may not be one of the required "two or more persons" necessary for a conspiracy conviction under § 371. United States v. Phillips, 630 F.2d 1138 (6th Cir. 1980).
- e. Minors. Minors may constitute one of the necessary "two or more persons." However, each case must be considered based on the circumstances present in each particular case, considering the age of the minor, their intellect, their education, etc.
- f. Landlords and Tenants. A landlord does not automatically become a co-conspirator simply because he or she has knowledge that a tenant is utilizing the property for criminal activities. Instead, it must be shown that the landlord was a party to the agreement. This can be done by showing that the landlord had a stake in the outcome of the conspiracy, above and beyond collecting the normal rent for the property. If this cannot be shown, the landlord may still be guilty under Title 18 U.S.C. § 2 (Principals), discussed later in this lesson plan.

- g. Buyers and Sellers as Conspirators. A merchant need not abstain from engaging in his lawful business simply because his customer is engaged in an illegal activity. United States v. Falcone, 311 U.S. 205 (1940). Knowledge of the part of the seller is not enough, standing alone, to make him or her a conspirator. The seller must also have the necessary intent to assist the criminal venture. For example, where a merchant charges more for the merchandise purchased for use in the criminal activity, the additional profits show that the seller has a stake in the outcome of the illegal venture. Direct Sales Co. v. United States, 319 U.S. 703 (1943).

Also, be aware of the following categories in determining the two or more persons requirement.

- h. Husbands and Wives. While considered a single "person" at common law, the Supreme Court has taken a different view, recognizing that a husband and wife may conspire with one another. United States v. Dege, 364 U.S. 51 (1960).
- i. Employers and Employees as Co-Conspirators. If an employee is aware that his or her work-related duties are contributing to a criminal venture on the part of his employer, the employee may be held liable as a conspirator.
- j. Attorneys. An attorney may become a co-conspirator by providing advice to conspirators, if the attorney provides the advice before or during the commission of the conspiracy; the attorney has knowledge of the conspiracy; and the attorney intends to assist the conspiracy in attaining its ultimate objective(s).
- k. Corporations. A corporation may be indicted for the crime of conspiracy in certain instances. Specifically, where there are two "real" people, one of whom is authorized to act on behalf of the corporation (e.g., a chief executive officer), and the conspiracy is formulated to benefit the corporation, both the individual conspirators and the corporation may be indicted.
- l. Consistency of Convictions
 - 1) Traditional Rule. Traditionally, the "Rule of Consistency" provided that, if co-conspirators were tried in a single trial, a sole co-conspirator could not be found guilty of conspiracy under § 371, if all other co-conspirators were acquitted.
 - 2) Recent Developments. The majority of the federal Courts of Appeal no longer follow the traditional rule.

Therefore, the conviction of a co-conspirator may be upheld, even if all other co-conspirators were acquitted of the conspiracy charge in the same trial.

- 3) Multiple Trials. The “Rule of Consistency” is inapplicable in cases where co-conspirators are tried in separate trials, based on the fact that different juries may hear different evidence.

D. EPO #13: IDENTIFY WHEN KNOWLEDGE AND INTENT ARE SUFFICIENT TO CONSTITUTE A CONSPIRACY

1. General Concepts. In a conspiracy prosecution, the government must prove that the defendant had knowledge of the conspiracy and intended to participate in it.
2. Knowledge. To be a co-conspirator, an individual must know of the conspiracy’s existence and its overall plan or purpose.
 - a. Knowledge Regarding Co-Conspirators. While the defendant in a conspiracy case must know at least one other person involved in the conspiracy, there is no requirement that the defendant know the identity, number, or role of all co-conspirators involved in the plan. Blumenthal v. United States, 332 U.S. 539 (1947).
 - b. Knowledge Regarding Details of the Plan. Secrecy and concealment are essential features of a successful conspiracy. Accordingly, there is no requirement that the defendant know all of the details of the conspiracy. Blumenthal, *supra*.
 - c. Reasonably Foreseeable Acts. The reasonably foreseeable acts of one co-conspirator, committed in furtherance of the overall plan of the conspiracy, are attributable to all other co-conspirators. Pinkerton, *supra*.
3. Intent. The government must show that the defendant intended to participate in the conspiracy. In most cases, a defendant’s intent must be inferred from the circumstances and proven through circumstantial evidence. In making this determination, courts will look at “the defendant’s relationship with other members of the conspiracy, the length of association between the members, the defendant’s attitude and conduct, and the nature of the conspiracy.” United States v. Collazo, 732 F.2d 1200 (4th Cir. 1984), *cert. denied*, 469 U.S. 1105 (1985).

**E. EPO #14: RECOGNIZE AN AGREEMENT AND ITS FUNCTIONS
ACCORDING TO THE PROVISIONS OF TITLE 18 U.S.C. § 371**

1. General Concepts. The essence of any conspiracy is the agreement itself. Two or more persons must agree to work together towards the accomplishment of a common goal. The government must prove the existence of an agreement in order to successfully prosecute conspirators under § 371.
2. Proving the Agreement. An agreement may be proven through circumstantial evidence. The agreement does not have to be put into words, either oral or written. United States v. Armstrong, 16 F.3d 289 (8th Cir. 1994). In fact, an agreement may be inferred from all of the facts and circumstances. Hamling v. United States, 418 U.S. 87 (1974).
3. Number of Conspiracies. To determine whether more than one conspiracy exists, the crucial factor is the number of agreements. United States v. Kearney, 560 F.2d 1358 (9th Cir. 1967), cert. denied, 434 U.S. 971 (1977). One agreement results in only one conspiracy, even though the agreement encompasses several unlawful acts. In determining the number of conspiracies in existence, courts will examine the nature of the scheme; the identity of the participants; the quality, duration, and frequency of each conspirator's transactions; and the commonality of time and goals. United States v. Cambindo-Valencia, 609 F.2d 603 (2d Cir. 1979), cert. denied, 446 U.S. 940 (1980).
4. Objects of the Agreement. In order to prosecute a defendant under § 371, either the object of the agreement or the means to accomplish the object must (1) be a crime against the United States or (2) tend to defraud the United States. The objective of the conspiracy does not have to be a crime. Hammerschmidt v. United States, 265 U.S. 182 (1924). It is sufficient to show that the contemplated objective would "impede, impair, defeat, or obstruct the proper functions of the United States Government."
 - a. Legal Objective/Illegal or Fraudulent Means. The objective of the conspiracy may be entirely legal, but the means of accomplishing it violate Federal law. For example, if the objective of the conspirators is to open their own restaurant, but they rob banks in order to obtain the funds, a conspiracy charge will lie.
 - b. Illegal or Fraudulent Objective/Legal Means. In this situation, the objective of the conspiracy is illegal (such as committing arson of a Federal building), but the means of accomplishing it are perfectly legal (such as buying matches and gasoline). Because the objective is a violation of

Federal law, a conspiracy charge can be brought.

- c. **Illegal or Fraudulent Objective and Means.** In this situation, both the objective and the means of accomplishing it are illegal, such as when individuals steal weapons to use in a bank robbery. In such a case, a conspiracy charge would be proper.
5. **Factual Impossibility.** Even though it may be factually impossible to accomplish the objective of the conspiracy, this is not a defense to a prosecution under § 371. United States v. Recio, 537 U.S. 270 (2003); United States v. Giry, 818 F.2d 120 (1st Cir.), cert. denied, 484 U.S. 855 (1987).

F. EPO #15: RECOGNIZE THE FUNCTION OF AN OVERT ACT IN THE CRIME OF CONSPIRACY

1. **General Concepts.** The final element that must be proven in any conspiracy prosecution under § 371 is that, following the agreement, one of the conspirators committed an overt act in furtherance of the agreement.
2. **Definition.** An “overt act” is any act by a conspirator that tends to assist in the accomplishment of the overall plan of the conspiracy.
3. **Purposes of the Overt Act.** The overt act serves three important purposes.
 - a. **Completes the Crime of Conspiracy.** Once an overt act is committed by one of the conspirators, the crime of conspiracy has been completed, irrespective of whether the ultimate goal of the conspiracy is ever committed.
 - b. **Withdrawal.** Since the crime of conspiracy is not actually complete until there has been an overt act, the overt act provides a demonstrable point in time before which an individual may withdraw from the agreement without incurring criminal liability under § 371.
 - c. **Proof of Intent.** The overt act demonstrates that the conspirators have moved from thinking about the crime to actually acting on their agreement. In other words, an overt act shows that the agreement is not dormant, but that it is actively being pursued by the conspirators. Yates v. United States, 354 U.S. 298 (1957); overruled on other grounds by, Burks v. United States, 437 U.S. 1 (1978).
4. **Number of Overt Acts Required.** Only one overt act must be committed to complete the conspiracy. A single overt act committed by one conspirator is sufficient to complete the conspiracy for all members, including those who join the conspiracy after it has begun. United

States v. Kissell & Harned, 218 U.S. 601 (1910).

5. Timing of the Overt Act. The overt act must occur after the agreement has been formed. An overt act performed prior to the agreement (sometimes termed a “preparatory act”) may not be used to complete the crime of conspiracy.
6. Nature of the Overt Act. The overt act need not be criminal in nature, but may, in fact, be entirely lawful. Braverman v. United States, 317 U.S. 49 (1942).

G. EPO #16: IDENTIFY WHEN A CO-CONSPIRATOR’S STATEMENT MAY BE USED DURING THE PROSECUTION OF A CONSPIRACY

1. General Concepts. Federal Rule of Evidence (Fed. R. Evid.) 801(d)(2)(E) provides, in pertinent part, that: “A statement is not hearsay if ... the statement is offered against a party and is ... a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.” Bourjaily v. United States, 483 U.S. 171 (1987).
2. Applying the Rule. Under Fed. R. Evid. 801(d)(2)(E), everything said, done, or written by a conspirator during the existence of the conspiracy and in execution or furtherance of the conspiracy is admissible against all co-conspirators. When determining whether a co-conspirator’s statement is admissible under this rule, the following five (5) questions must be asked:
 - a. Was There a Conspiracy?
 - b. Was the Defendant a Member of the Conspiracy?
 - c. Was the Person Who Made the Statement a Member of the Conspiracy?
 - d. Was the Statement Made During the Conspiracy?
 - e. Was the Statement Made In Furtherance of the Conspiracy?
3. Analyzing the Responses. If the answer to each of the above questions is “yes,” then the statement is admissible under Fed. R. Evid. 801(d)(2)(E). However, if the answer to any of the above questions is “no,” then the statement is not admissible under this rule, although it may be admissible under another exception or exclusion to the hearsay rule. Bourjaily, supra. Moreover, even though the statement is admissible, a co-conspirator’s statement standing alone is not sufficient to prove the existence of the conspiracy or that the declarant or the defendant is a member of a conspiracy. Fed. R. Evid. 801(d)(2)(E)

H. EPO #17: IDENTIFY THE LIMITS OF THE WITHDRAWER'S OR LATE JOINER'S CRIMINAL LIABILITY

1. General Concepts. The law recognizes that someone may join or withdraw from a conspiracy after it has begun. Those who join the conspiracy after it has begun are referred to as "late joiners," while those who leave the conspiracy after it has begun are referred to as "withdrawers."
2. Late Joiners
 - a. Criminal Liability. "Late joiners" are criminally liable not only for conspiracy, but for any reasonably foreseeable crimes committed by his co-conspirators while the "late joiner" is a member of the conspiracy, to include the ultimate goal of the conspiracy if it is a criminal offense. However, "late joiners" are not criminally responsible for any acts of co-conspirators committed prior to their joining the conspiracy. Levine v. United States, 383 U.S. 265 (1966). Nonetheless, the prior acts of the co-conspirator's are admissible at the trial of the "late joiner" in order to show that there was actually a conspiracy in existence for the "late joiner" to join. United States v. G.M. Corporation, 121 F.2d 376 (7th Cir. 1941), cert. denied, 314 U.S. 618 (1941).
 - b. Effect on Conspiracy. The addition of a new conspirator does not create a new conspiracy.
 - c. No Additional Overt Act Required. The addition of a new conspirator does not require that an additional overt act be performed after the "late joiner's" addition.
3. Withdrawers. A commonly utilized defense to a conspiracy charge is withdrawal.
 - a. Criminal Liability. A conspirator who withdraws from a conspiracy is liable for the crime of conspiracy, as well as any reasonably foreseeable crimes committed by his co-conspirators while he was a member of the conspiracy. Only by withdrawing from the agreement prior to the overt act can an individual entirely avoid liability for a conspiracy charge. Once a valid withdrawal occurs, however, the withdrawing conspirator will escape liability for any subsequent criminal acts of the remaining conspirators. United States v. Richardson, 939 F.2d 135 (4th Cir. 1991), cert. denied, 502 U.S. 1061 (1992).
 - b. Requirements. There are two (2) requirements that must be met for a conspirator to validly withdraw from a conspiracy.

- 1) Affirmative Act. The first requirement the defendant must prove to establish a valid withdrawal from a conspiracy is that he or she took some affirmative act(s) inconsistent with the goals of the conspiracy. Unless the defendant produces affirmative evidence of withdrawal, his or her participation is presumed to continue. Hyde v. United States, 225 U.S. 347 (1912).
- 2) Communication. The affirmative act of withdrawal must be communicated in a manner reasonably calculated to reach at least one other co-conspirator or law enforcement. United States v. United States Gypsum Co., 438 U.S. 422 (1978).
- c. Mere Cessation of Activity. Withdrawal from a conspiracy requires more than simply cessation of participation in the conspiracy. United States v. Barsanti, 943 F.2d 428 (4th Cir. 1991), cert. denied, 503 U.S. 936 (1992).
- d. Burden. The burden of proving a valid withdrawal rests with the defendant.
- e. Effect on Conspiracy. The withdrawal of a single conspirator does not terminate the conspiracy or change the status of the remaining conspirators, unless the required "two or more persons" are no longer present (such as the withdrawal of a single conspirator from a two-person conspiracy).

I. EPO #18: IDENTIFY WHEN A PERSON MAY BE PROSECUTED FOR ASSISTING ANOTHER IN THE COMMISSION OF A CRIME, IN ACCORDANCE WITH TITLE 18 U.S.C. §§ 2-4.

1. Title 18 U.S.C. § 2(a). Title 18 U.S.C. § 2 is actually entitled "Principals." Pursuant to this statute, individuals who provide assistance to a principal either before or during the commission of a crime may be held criminally liable as if they themselves had committed the offense. The statute is actually broken into two (2) subsections. The first part of the statute, subsection §2(a), deals with "aiding and abetting" a crime, and reads as follows:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal."

 - a. Liability of Defendant. It is important to remember that, if an individual is found guilty of being an "aider and abettor," he or she may be punished as if they had committed the crime themselves (i.e., as if they themselves were the principal of

the offense).

- b. The Elements of Aiding and Abetting. There are three (3) elements necessary to prove a crime under subsection § 2(a).
 - 1) Affirmative Act of Association. The statute requires that a defendant actually do something to assist in the commission of the crime.
 - a) Definition. An "affirmative act of association" has been defined as follows: "In order to aid and abet another to commit a crime, it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, and that he seek by his action to make it succeed." United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).
 - b) Timing. The affirmative act of association must occur either before or during the commission of the crime by the principal. If the act occurs after the commission of the crime, the defendant may be held liable as an "accessory after the fact," discussed more below.
 - c) Mere Presence. The defendant is not required to be present at the time the crime is committed to be liable under § 2(a). Hume v. United States, 118 F. 689 (5th Cir. 1902), cert. denied, 189 U.S. 510 (1903). Further, mere presence at the scene of the crime, even in the presence of the principal, does not, standing alone, make an individual an aider and abettor. United States v. Williams, 341 U.S. 58 (1951).
 - 2) Knowledge. In addition to an affirmative act of association, the defendant must also have knowledge that he or she is assisting in the commission of a crime.
 - a) Detail Required. There is no requirement that the defendant know all of the details of the crime. Williams v. United States, 308 F.2d 664 (9th Cir. 1962). However, where an individual unknowingly provides assistance to a principal, a prosecution under § 2(a) will not lie.
 - b) Willful Blindness. Deliberate avoidance of

knowledge will not preclude a finding of knowledge. This occurs when a defendant asserts a lack of guilty knowledge, but the evidence supports an inference that he or she instead chose to intentionally avoid gaining knowledge about the circumstances surrounding their assistance in order to avoid liability. United States v. Gruenberg, 989 F.2d 971 (8th Cir. 1993).

- 3) Commission of an Offense Against the United States. In order to prosecute an individual as a principal under 18 U.S.C. 2(a), a crime must actually be committed. United States v. Provenzano, 334 F.2d 678 (3d Cir.), cert. denied, 379 U.S. 497 (1964).
 - a) Conviction of Principal. A defendant may be convicted under § 2(a) even though the person who actually committed the crime is never convicted, caught, or even identified. United States v. Untiedt, 493 F.2d 1056 (8th Cir.), cert. denied, 419 U.S. 862 (1974).
 - b) Charging the Crime. When an individual is charged with aiding and abetting, the indictment need not specifically charge “aiding and abetting.” United States v. Armstrong, 909 F.2d 1238 (9th Cir.), cert. denied, 498 U.S. 870 (1990). Because those who aid and abet a crime are held liable as the principal of the crime, the indictment would charge the defendant with the completed offense (e.g., bank robbery).

2. Title 18 U.S.C. § 2(b). The second subsection of the statute, § 2(b), addresses those individuals who intentionally cause another person to commit an offense against the United States. This subsection reads as follows:

“Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal.”

- a. The Elements of “Causing.” There are three (3) elements necessary to prove a crime under subsection § 2(b).
 - 1) An Act. The defendant must cause another to perform some act that, if directly performed by the defendant or another, would be a crime. United

States v. Kelley, 395 F.2d 727 (2d Cir.), cert. denied, 393 U.S. 963 (1968).

- 2) Intentional. Further, the defendant must intentionally cause the other to perform the act.
 - 3) Offense Against the United States. Finally, the defendant must cause the other to perform an act that is an offense against the United States.
- b. Additional Concepts
- 1) Mere Presence. A prosecution under § 2(b) does not require that the defendant be present at the time the criminal act occurs.
 - 2) Knowledge. Further, there is no requirement under § 2(b) that the defendant actually know the individual who commits the crime.
 - 3) Conviction of Other Person. Finally, there is no requirement under § 2(b) that the person who actually committed the crime be convicted before the defendant can be convicted.
 - 4) Charging. As with § 2(a), the defendant need not specifically be charged in the indictment with “causing” another to commit the crime, but only with the completed offense.
3. Title 18 U.S.C. § 3. Title 18 U.S.C. § 3 is directed at those individuals who provide assistance to the principal of a crime following the commission of the crime. The statute provides as follows:
- “Whoever, knowing that an offense against the United States committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.”
- a. Liability of Defendant. “Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or ... fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by life imprisonment or death, the accessory shall be imprisoned not more than 15 years.”
 - b. The Elements of Accessory After the Fact. There are three (3) elements necessary to prove a crime under § 3.
 - 1) Crime Must Be Committed. First, a crime must

actually be committed before a defendant can be found guilty of violating 18 U.S.C. § 3. Whether the crime was a felony or misdemeanor is irrelevant.

- 2) Knowledge. Second, the defendant must have knowledge that a crime has been committed, although he or she need not know the precise nature of the crime. United States v. Balano, 618 F.2d 624 (10th Cir. 1979), cert. denied, 449 U.S. 840 (1980).
- 3) Assistance to the Principal. Third, the defendant must willfully assist the principal so as to prevent or hinder the apprehension, trial or punishment of the principal.

c. Additional Concepts

- 1) Timing of the Assistance. A violation of § 3 can occur only after the crime has been committed. Government of the Virgin Islands v. Aquino, 378 F.2d 540 (3d Cir. 1967). A defendant who provides assistance to the principal before the crime or while the crime is in progress is guilty as an aider and abettor. United States v. Barlow, 470 F.2d 1245 (D.C. Cir. 1972).
 - 2) Conviction of the Principal. As with aiding and abetting, the conviction of the principal is not required to convict the defendant of violating § 3. United States v. Walker, 415 F.2d 530 (9th Cir. 1969).
 - 3) Silence as Assistance. An individual's silence may not be used to prove that the individual is an accessory after the fact. However, where an individual provides false or misleading statements to law enforcement officers, those statements may be used to prove the offense.
4. Title 18 U.S.C. § 4. Title 18 U.S.C. § 4 is directed at those individuals who have knowledge of a felony offense and take affirmative steps to conceal the crime and fail to disclose their knowledge to criminal investigators. As stated by one court, "misprision of felony" is the concealment of a felony without giving any degree of help to the individual who actually committed the crime." United States v. Perlstein, 126 F.2d 789 (3d Cir.), cert. denied, 316 U.S. 678 (1942). The statute reads as follows:

"Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both."

- a. The Elements of Misprision of Felony. There are four (4) elements necessary to prove a crime under § 4. Lancey v. United States, 356 F.2d 407 (9th Cir.), cert. denied, 385 U.S. 922 (1966).
 - 1) Felony Committed. First, a felony must have been committed by the principal.
 - 2) Knowledge. Second, the defendant must have knowledge that the felony had been committed.
 - 3) Affirmative Act of Concealment. Third, the defendant must have performed either an affirmative act of concealment or an act that concealed the true nature of the crime.
 - 4) Failure to Disclose. Finally, the defendant must fail to disclose his knowledge of the crime as soon as possible.
 - a) Mere Failure to Report. A simple failure to report a crime does not, without an affirmative act of concealment, make one guilty of misprision of felony. However, where an individual lies to or misleads criminal investigators, this element may be met. United States v. Pittman, 527 F.2d 444 (4th Cir. 1975), cert. denied, 424 U.S. 923 (1976).
 - b) Self-Incrimination as a Defense. If the defendant is implicated in the crime committed by the principal, the right against compelled self-incrimination may provide a viable defense for a defendant accused of misprision of felony. Hoffman v. United States, 341 U.S. 479 (1951).
- b. Accessory After the Fact v. Misprision of Felony. There is a very close relationship between these two statutes. However, there are some differences that should be noted.
 - 1) Maximum Punishment. The maximum possible punishments for both offenses are different.
 - 2) Felony Required. By statutory definition, misprision of

felony can only occur when a felony crime has been committed by the principal. On the other hand, accessory after the fact may be charged regardless of the severity of the principal's offense.

- 3) Assistance to Principal. A defendant accused of being an accessory after the fact must intentionally assist the principal of the offense, while one accused of misprision of felony need only commit an act of concealment without necessarily intending to assist the principal.

J. ADDITIONAL TEACHING POINTS FOR THE CRIME OF CONSPIRACY

1. **Introduction.** The following additional teaching points may be made by the instructor, should time permit. These points deal with the statute of limitations, and venue for a conspiracy charge and attempt to commit a crime. At the present time, these additional teaching points are not testable material.
2. **Statute of Limitations.** Pursuant to Title 18 U.S.C. § 3282, the statute of limitations for the crime of conspiracy is five (5) years.
 - a. **Running of the Statute.** The statute of limitations begins to run from the date the conspiracy is terminated, which could result from a variety of situations, such as consummation of the objective or abandonment. Typically, however, the statute of limitations begins to run from the date the last overt act was committed in furtherance of the conspiracy. Fiswick v. United States, 329 U.S. 211 (1946); United States v. Bornman, 559 F.3d 150 (3d Cir. 2009).
 - b. **Continuing Concealment of the Conspiracy.** An agreement among the conspirators to conceal a conspiracy after its goals have been accomplished may, depending on the nature of the agreement, extend the running of the statute of limitations on the conspiracy charge. Grunewald v. United States, 353 U.S. 391 (1957).
 - c. **Statute of Limitations on the Substantive Offense.** The statute of limitations for any substantive offense committed by the conspirators begins to run from the date the offense was committed.
3. **Venue.** The Sixth Amendment requires that prosecution occur "in the State and District wherein the crime shall have been committed."
 - a. **Venue for the Conspiracy Charge.** Because the legal basis for a conspiracy charge is an agreement and an overt act in furtherance of that agreement, venue for a conspiracy charge can actually lie in two (2) separate locations.
 - 1) **Agreement.** Venue for the conspiracy charge will lie in the district where the agreement was entered into.
 - 2) **Overt Acts.** Venue for the conspiracy charge will also lie in any district in which any overt act in furtherance of the agreement was entered into. Further, since the overt act of one conspirator is considered to be the overt act of all, an overt act by one conspirator will establish venue for all conspirators in a single district, even in a district where the others were never

physically present.

- b. Venue for Substantive Offenses. If a substantive offense is committed, venue for that offense will lie in the district where the crime actually occurred.
 - c. Title 18 U.S.C. § 3238. If the substantive offense is not committed within any state or district (e.g., the high seas), venue will lie in the district where the offender was arrested or into which he or she was first brought.
4. **Attempt**. Federal law provides no statutory definition of attempt to commit a crime. Precedent, however, establishes that to prove an attempt, the government must show a defendant's intent to commit the proscribed criminal conduct together with the commission of an act that constitutes a substantial step towards the commission of the proscribed criminal activity. United States v. Pennyman, 889 F.2d 104 (6th Cir. 1989). Thus the crime of attempt requires proof of specific intent to complete the acts constituting the substantive offense, regardless of whether the choate offense is a general or specific intent crime.
- a. Impossibility. Factual impossibility, that is, the defendant is unable to accomplish what he intends because of some facts unknown to him, is not a defense to an attempt charge.
 - b. Abandonment/Withdrawal. The Model Penal Code recognizes abandonment as an affirmative defense to attempt under circumstances manifesting a complete and voluntary renunciation of criminal purpose. However, circuits addressing this issue have ruled that after a defendant has evidenced the necessary intent and has committed an act constituting a substantial step toward the commission of the offense, he has committed the crime of attempt, and can withdraw only from the commission of the substantive offense. See, e.g. United States v. Shelton, 30 F.3d 702 (6th Cir. 1994).

V. OBSTRUCTION OF JUSTICE

A. RAPPORT AND OPENING STATEMENT

1. The obstruction of justice statutes are designed to protect the integrity of the entire federal court system, whether the proceedings are administrative and pending before a Federal agency; legislative and pending before Congress; or judicial and pending as civil, or criminal proceedings before any level of the Federal judiciary.
2. When viewed and used together, these statutes provide a federal criminal investigator with powerful weapons against any person who seeks to corrupt ongoing investigations and court proceedings, as well as possible future investigations.
3. This course will examine four specific provisions of the United States Code that pertain to obstruction of justice in regard to criminal investigations and proceedings.

B. ENABLING PERFORMANCE OBJECTIVES (EPO)

- EPO #19: Identify conduct that can be prosecuted under Title 18 U.S.C. §§ 1503 and 1510.
- EPO #20: Identify the groups of persons who are protected under Title 18 U.S.C. §§ 1512 and 1513.
- EPO #21: Identify conduct that constitutes "tampering" in violation of Title 18 U.S.C. § 1512 and conduct that constitutes "retaliation" in violation of Title 18 U.S.C. § 1513.

C. EPO #19: IDENTIFY CONDUCT THAT CAN BE PROSECUTED UNDER TITLE 18 U.S.C. §§ 1503 AND 1510

1. Title 18 U.S.C. §1503. This statute was enacted to ensure that court proceedings would take place in an atmosphere that would be conducive to seeking and finding the truth, without fear of intimidation, coercion, or corruption.
2. The Statute. Entitled "Influencing or Injuring Officer or Juror Generally," the statute provides as follows:
 - a. *"(a) Whoever, corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States*

magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede the due administration of justice, shall be punished as provided in subsection (b).

3. Title 18 U.S.C. § 1503 serves to protect the individuals involved in the federal court system and the integrity of the system itself.
 - a. Section 1503 can be broken down into two distinct parts. The first part of § 1503 covers obstruction of justice by those who would tamper with, or retaliate against jurors or officers of the court. Officers of the court include judges, prosecutors, and defense counsel. Law enforcement officers are not covered under § 1503 as officers of the court.
 - b. The second part of § 1503 contains an omnibus clause, or catch-all provision that prohibits any conduct that would obstruct the due administration of justice. The omnibus clause allows prosecutions for obstruction of justice even if the defendant's actions were not specifically prohibited in § 1503, or if these actions were against individuals other than jurors and officers of the court, witnesses, for example. See United States v. Simmons, 591 F2d. 206 (3d Cir. 1979). The defendant was charged with two counts of obstructing justice under the omnibus clause of § 1503. In one count he was charged after he destroyed documents that had been subpoenaed by the grand jury. In the second count he was charged after he instructed his employees to withhold information from the grand jury after they were subpoenaed to testify. The court

held that in both instances the defendant's conduct obstructed the due administration of justice because it affected the ability of the grand jury to carry out its function. U.S. v. Rovetuso, 768 F.2d 809, 824 (7th Cir. 1985). (Section 1503 is violated when a defendant interferes with the due administration of justice by tampering with a witness).

4. The Elements of the Statute.

a. For § 1503 Tampering:

- 1) Whoever corruptly, or by threats, or force, or by any threatening letter, or communication,
- 2) Endeavors to influence, intimidate, or impede,
- 3) Any grand or petit juror, or officer in, or of , any court of the United States,
- 4) In the discharge of his duty.

b. For § 1503 Retaliation (juror):

- 1) Whoever injures,
- 2) Any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him or on account of his being or having been such juror.

c. For § 1503 Retaliation (judge and officers of the court):

- 1) Whoever injures,
- 2) Any such officer, magistrate judge or other committing magistrate in his person or property on the account of the performance of his official duties.

d. For § 1503 (omnibus):

- 1) Whoever, corruptly, or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes or endeavors to influence, obstruct, or impede,
- 2) the due administration of justice.

5. Intent. The government must also prove that the defendant acted "corruptly," which is to say with an evil or wicked intent. United States v. Barfield, 999 F.2d 1520 (11th Cir. 1993). The action taken by the defendant must be with the intent to influence judicial or grand jury proceedings. United States v. Aguilar, 515 U.S. 593, 599 (1995)

(holding that uttering false statements to an investigating agent who might or might not testify before a grand jury is not sufficient for § 1503 liability). This is a "specific intent" crime, so if the intent cannot be shown, the crime cannot be charged. United States v. Bashaw, 982 F.2d 168 (6th Cir. 1992). To establish a violation of § 1503, the government must demonstrate that the defendant knew of the pending judicial proceeding and specifically intended to impede its administration. United States v. Guzzino, 810 F.2d 687, 696 (7th Cir.).

6. **Factual Impossibility.** Whether the attempted obstruction of justice was successful is irrelevant for charging a violation of § 1503. The statute proscribes the endeavor to influence or obstruct the administration of justice; thus the impossibility of accomplishing the goal of the obstruction of justice does not prevent a prosecution for the endeavor to accomplish such a goal. United States v. Bucey, 876 F.2d 1297 (7th Cir. 1989). (Defendant, with knowledge of the ongoing grand jury investigation and of the subpoena issued to the witness, counseled the witness on how to role-play his grand jury testimony with his attorney, and instructed the witness to provide false and misleading testimony to the grand jury. The witness however, was an undercover government agent who never intended to testify in front of the grand jury). Osborn v. United States, 385 U.S. 323, 333 (1966) (Defendant employed an individual to contact a prospective juror and offer him a bribe. The individual was an informant for the government. Although the informant never intended to carry out the scheme to bribe the juror, that did not preclude the defendant's conviction for endeavoring to bribe a juror.
7. **Examples.** The following cases show actions that constitute violations of § 1503.
 - a. Destroying documents sought by a grand jury. United States v. Ruggiero, 934 F.2d 440 (2d Cir. 1991).
 - b. Attempting to persuade a witness to falsely recant his trial testimony while the defendant's case is on appeal. United States v. Moody, 977 F.2d 1425 (11th Cir. 1992).
 - c. Soliciting a third-party to approach the judge in the defendant's case in an effort to influence the sentence to be imposed at the defendant's upcoming sentencing. United States v. Glickman, 604 F.2d 625 (9th Cir. 1979).
 - d. Standing up during the testimony of a witness, shaking his fist, and saying "You better not!" constituted obstruction of the due administration of justice. United States v.

Harris, 558 F.2d 366 (7th Cir. 1977).

- e. Falsifying a report likely to be given to a grand jury. United States v. Mullins, 22 F.3d 1365 (6th Cir. 1994).
 - f. Endeavoring to suborn perjury. United States v. Kenny, 973 F.2d 339 (4th Cir. 1992).
 - g. Giving false denials of knowledge and memory or false and evasive testimony. United States v. Langella, 776 F.2d 1078 (2d Cir. 1985).
8. Title 18 U.S.C. § 1505. This statute was enacted to ensure that administrative and civil proceedings were as free from corruption, fraud, and threats as criminal proceedings. Thus, it covers proceedings before any agency, whether administrative or civil in nature, as well as any actions that are designed to impede any investigations that are being conducted by any agency or by Congress. (Although there is no EPO regarding § 1505 this is included for the instructors' information)
9. The Statute. Entitled "Obstruction of Proceedings Before Departments, Agencies, and Committees," the statute provides as follows:
- a. *"Whoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so; or*
 - b. *Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress -Shall be fined under this title or imprisoned not more than five years, or if the*

offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both."

10. The Elements of the Statute. In order to prove a violation of § 1505, the following three (3) elements must be shown. United States v. Price, 951 F.2d 1028 (9th Cir. 1991).
 - a. Pending Proceeding. First, there must be a "proceeding" pending before a department or agency of the United States.
 - b. Knowledge. Second, the defendant must be aware of the pending proceeding(s).
 - c. Intent. Third, the defendant must have intentionally endeavored to corruptly influence, obstruct or impede the pending proceeding(s).
11. Examples. The following cases show actions that constitute violations of § 1505.
 - a. Destroying documents after an administrative subpoena had been served on a corporation in the course of a Department of Energy audit. United States v. Sutton, 732 F.2d 1483 (10th Cir. 1984).
 - b. Submitting false reports by written and oral representations in a Department of Labor investigation. United States v. Sullivan, 618 F.2d 1290 (8th Cir. 1980).
 - c. Making false statements to a Department of Defense auditor. United States v. Leo, 941 F.2d 181 (3d Cir. 1991).
12. Title 18 U.S.C. § 1510. Prior to the enactment of § 1510 it was not a crime to obstruct a criminal investigation or inquiry before the initiation of proceedings within the scope of § 1503 or § 1505. This statute was enacted to close the loophole on the protection of witnesses and informants created as a result of the "pending proceeding" requirement of § 1503 and § 1505, and provide for the prosecution of those who would interfere with the criminal investigative process. When initially enacted § 1510 prohibited any actions taken to obstruct federal criminal investigations by bribery, intimidation, misrepresentation, force or threats of force, and for retaliation against informants. In 1982 upon enactment of 18 U.S.C. § 1512, section 1510 was amended. As amended § 1510 prohibits any actions taken to obstruct federal criminal investigations by bribery. (See United States v. King, 762 F.2d 232 (2d

Cir. 1985)). Section 1510 is aimed at those who try to buy the silence of an actual or potential witness through bribery. The statute also creates additional criminal liability when an officer of a financial institution "tips off" a customer or any other person about either the existence or the contents of a grand jury subpoena for financial information. However, that portion of the statute is beyond the purview of this course.

13. The Statute. Entitled "Obstruction of Criminal Investigations," the statute provides, in pertinent part, as follows:
 - a. *"(a) Whoever willfully endeavors by means of bribery to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator shall be fined under this title, or imprisoned not more than five years, or both."*
14. The Elements of the Statute. To prove a violation of § 1510, the government must establish the following elements.
 - a. Willfulness. First, the government must show that the defendant intentionally tried to obstruct, delay, or prevent another person from communicating information to a criminal investigator.
 - b. Bribery. Second, the government must show that the attempt to silence the witness was by means of bribery (offering something of value to the witness).
 - c. Criminal Statute. Finally, the information that the defendant is trying to stop from reaching criminal investigators must relate to a violation of a criminal statute of the United States.
15. Knowledge Required. The government must show that the defendant had actual knowledge that the intended recipient of the information was a federal criminal investigator. United States v. Lippman, 492 F2d 314 (6th Cir. 1974). However, the defendant need not actually know that the information has been or is about to be supplied to a federal criminal investigator. It is required only that the defendant believed that information might be supplied to a federal criminal investigator.
16. Victim's Intent. The government is not required to show that the victim actually intended to give information to a federal criminal investigator or that the defendant knew the contents of the information. Further, it is not necessary to prove that the victim felt threatened (i.e., the victim

could be a willing participant in the obstruction).

17. Investigation Not Required to be Ongoing. To successfully prosecute a defendant for violating § 1510, there is no requirement that an investigation be underway or ongoing. Actions taken prior to the commencement of a formal investigation come within the statute if the prosecution proves that the defendant knew or reasonably believed that the person sought to be influenced had relevant information and was likely to share it with law enforcement officers.

D. EPO #20: IDENTIFY THE GROUPS OF PERSONS WHO ARE PROTECTED UNDER TITLE 18 U.S.C., §§ 1512 AND 1513

1. Title 18 U.S.C. §1512. Congress passed the Victim Witness Protection Act in 1982 which created § 1512 and § 1513. Section 1512 was enacted to protect various classes of individuals before they testify or communicate information to a law enforcement officer. It prohibits conduct that is intended to drastically impact and subvert the lawful presentation of evidence in federal proceedings or the communication of information to a federal law enforcement officer or federal judge. It is important to note that this statute covers both "violent" tampering, as well as more subtle forms of tampering, such as deliberately using false and misleading statements to cause a witness to either fail to appear or to destroy or alter evidence.
2. § 1512. Tampering with a witness, victim, or an informant
 - (a) (1) Whoever kills or attempts to kill another person, with intent to--
 - (A) prevent the attendance or testimony of any person in an official proceeding;
 - (B) prevent the production of a record, document, or other object, in an official proceeding; or
 - (C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;shall be punished as provided in paragraph (3).
 - (2) Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to--
 - (A) influence, delay, or prevent the testimony of any person in an official proceeding;
 - (B) cause or induce any person to--
 - (i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
 - (ii) alter, destroy, mutilate, or conceal an object with intent to

impair the integrity or availability of the object for use in an official proceeding;

(iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

... (iv) be absent from an official proceeding to which that person has been summoned by legal process; or

(C) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(3) The punishment for an offense under this subsection is--

(A) in the case of murder (as defined in section 1111), the death penalty or imprisonment for life, and in the case of any other killing, the punishment provided in section 1112;

(B) in the case of--

(i) an attempt to murder; or

(ii) the use or attempted use of physical force against any person; imprisonment for not more than 20 years; and

(C) in the case of the threat of use of physical force against any person, imprisonment for not more than 10 years.

(b) Whoever knowingly uses intimidation, threatens or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to--

(1) influence, delay or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to--

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than ten years, or both.

(c) Whoever corruptly--

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be fined under this title or imprisoned not more than 20 years, or both.

(d) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from--

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined under this title or imprisoned not more than one year, or both.

(e) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(f) For the purposes of this section--

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(g) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance--

(1) that the official proceeding before a judge, court, magistrate, grand jury, or government agency is before a judge or court of the United States, a United States magistrate [United States magistrate judge], a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(h) There is extraterritorial Federal jurisdiction over an offense under this section.

(i) A prosecution under this section or section 1503 may be brought in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred.

(j) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(k) Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

3. Section 1512 encompasses four distinct offenses.
 - a. Killing or attempting to kill a victim, witness, or informant;
 - b. Intimidating, threatening, or misleading a witness, victim, or informant; and
 - c. Harassing a witness, victim, or informant.
 - d. Destroying or concealing documents to impair their integrity or availability in a proceeding.
4. The Elements of the Statute. The following elements must be proven to convict a defendant of violating §1512.
 - a. Killing or Attempting to Kill a Victim, Witness or Informant
 - 1) That the defendant killed, attempted to kill, or used physical force against a witness, victim or informant, **with the intent to:**
 - 2) Prevent their attendance or testimony in an official proceeding, **or**
 - 3) Prevent the production of documents, or other objects in an official proceeding, **or**
 - 4) Prevent the communication of a federal criminal violation to a federal law enforcement officer or judge.
 - b. Intimidating, Threatening or Misleading a Witness, Victim or Informant
 - 1) That the defendant **knowingly** used intimidation, threats, or engaged in misleading conduct toward

another person **with the intent to:**

- 2) Prevent their attendance or testimony in an official proceeding, **or**
- 3) Prevent the production of documents or other objects in an official proceeding, **or**
- 4) Prevent the communication of a federal criminal violation to a federal law enforcement officer or judge.

c. Harassing a Witness, Victim or Informant

- 1) That the defendant **intentionally** harassed a witness, victim or informant which resulted in:
- 2) Hindering, delaying, preventing, or dissuading the person from:
- 3) Attending or testifying in an official proceeding, **or**
- 4) Reporting to a law enforcement officer or judge of the United States a violation of federal law.

d. Destruction, Mutilation or Concealment of Documents or Objects

- 1) That the defendant **corruptly** altered, destroyed, mutilated, or concealed a record, document or other object **with the intent to:**
- 2) Impair the object's integrity or availability for use in an official proceeding

5. Who is Protected? The following persons are protected by the provisions of §1512.

- a. Victims;
- b. Witnesses; and
- c. Informants

6. Timing of the Offense. This statute covers actions by a defendant that take place before an individual testifies or provides information to the government.

7. Extraterritorial Jurisdiction. There is extraterritorial federal jurisdiction over an offense under §1512. Thus, the acts which constitute a basis for the charge do not have to occur within the jurisdiction of the United States.

8. Title 18 U.S.C. §1513. This statute protects witnesses, victims, and informants after they have testified or reported information to a criminal

investigator or law enforcement officer. Under §1513, two types of conduct are addressed. First, the statute addresses threats of retaliation; second, the statute addresses attempts at retaliation.

9. The Statute. Entitled "Retaliating Against a Witness, Victim, or an Informant," the statute provides as follows.

§ 1513. Retaliating against a witness, victim, or an informant

(a) (1) Whoever kills or attempts to kill another person with intent to retaliate against any person for--

(A) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or

(B) providing to a law enforcement officer any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings,

shall be punished as provided in paragraph (2).

(2) The punishment for an offense under this subsection is--

(A) in the case of a killing, the punishment provided in sections 1111 and 1112; and

(B) in the case of an attempt, imprisonment for not more than 20 years.

(b) Whoever knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for--

(1) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or

(2) any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings given by a person to a law enforcement officer;

or attempts to do so, shall be fined under this title or imprisoned not more than ten years, or both.

(c) If the retaliation occurred because of attendance at or testimony in a criminal case, the maximum term of imprisonment which may be imposed for the offense under this section shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(d) There is extraterritorial Federal jurisdiction over an offense under this

section.

(e) Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

[(f)](e) Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

10. Section 1513 encompasses three distinct offenses when retaliatory action is taken against a victim, witness or informant on account of their involvement in a federal investigation or proceeding.
 - a. Killing or attempting to kill a witness, victim or informant
 - b. Causing bodily injury to a witness, victim or informant, or damage to their property,
 - c. Taking any harmful action against a witness, victim or informant.
11. The Elements of the Statute. The following elements must be proven to convict a defendant of violating §1513.
 - a. Killing or Attempting to Kill a witness, victim or informant.
 - 1) That the defendant killed or attempted to kill a witness, victim or informant with the ***intent to retaliate*** against them for:
 - 2) Their attendance or testimony in an official federal proceeding, ***or***
 - 3) The production of a document or other object in a federal proceeding, ***or***
 - 4) The communication of a federal violation to a federal law enforcement officer....
 - b. Causing bodily injury to a witness, victim or informant or damage to their property. .
 - 1) That the defendant ***knowingly*** engaged in any conduct which
 - 2) Caused bodily injury to another person or their property, or threatened to do so with ***the intent to***

retaliate against them for:

- 3) Their attendance or testimony in an official federal proceeding, ***or***
 - 4) The production of a document or other object in a federal proceeding, ***or***
 - 5) The communication of a federal violation to a federal law enforcement officer.
- c. Taking any harmful action against a witness, victim or informant.
- 1) That the defendant knowingly, with the intent to retaliate
 - 2) Took any harmful action, including interference with the lawful employment or livelihood of any person,
 - 3) For providing to a law enforcement officer any truthful information relating to the commission or possible commission of any federal offense.

12. In order to prove a violation of any provision of § 1513, the government must prove the following elements.
- a. An Act. First, the government must prove that the defendant retaliated against, attempted to retaliate against, or threatened to retaliate against, an individual who had testified or reported information to a criminal investigator.
 - b. Intent. Second, the government must prove that the defendant acted with the specific intent to retaliate against the individual for his or her testimony or reporting.
 - c. Knowledge. Third, the government must prove that the defendant intentionally took action against the individual with the knowledge that the victim or another person had been a party to or a witness in a federal proceeding or had reported information to a federal law enforcement officer.
13. Extraterritorial Jurisdiction. Again, there is extraterritorial federal jurisdiction over an offense under section 1513.

E. EPO #21: IDENTIFY CONDUCT THAT CONSTITUTES “TAMPERING” IN VIOLATION OF TITLE 18 U.S.C. § 1512 AND CONDUCT THAT CONSTITUTES “RETALIATION” IN VIOLATION OF TITLE 18 U.S.C. § 1513

1. The following acts constitute “tampering” in violation of 18 U.S.C. § 1512.
 - a. Killing or attempting to kill a person to prevent testimony or production of documents or information. United States v. Galvan, 949 F.2d 777 (5th Cir. 1991).
 - b. Using intimidation tactics, although the witness does not have to be intimidated in fact. United States v. Johnson, 903 F.2d 1084 (7th Cir. 1990).
 - c. Using physical force against a witness or informant. United States v. Scaife, 749 F.2d 338 (6th Cir. 1984).
 - d. Threatening the use of physical force. United States v. Dunning, 929 F.2d 579 (10th Cir. 1991).
 - e. Corruptly persuading a person not to testify. United States v. Aguilar, 21 F.3d 1475 (9th Cir. 1994).
2. The following demonstrates “retaliation” in violation of 18 U.S.C. § 1513.
 - a. Actions that do not rise to the level of attempt may be successfully prosecuted as “endeavors” under this statute, if the goal was to cause injury. United States v. Garcia-Pupo, 845 F.2d 8 (1st Cir. 1988).
 - b. Threats to retaliate are enough to prosecute under this statute when it can be proven that the defendant acted with the specific intent to obstruct a federal investigation or proceeding. United States v. Brown, 937 F.2d 32 (2d Cir. 1991).
 - c. The fact that a threat is never carried out does not act as a defense to a charge of violating § 1513. United States v. Maggitt, 784 F.2d 590 (5th Cir. 1986).

F. § 1503 OMNIBUS CLAUSE AND § 1512

1. With the passage of the Victim and Witness Protection Act in 1982 it was possible for a person to be charged with witness tampering under § 1512 or under § 1503 (Omnibus Clause). An issue for the courts to decide was whether § 1512 was the exclusive statute for charging witness tampering, or could a person be charged with witness tampering under the Omnibus Clause of §1503.
2. A majority of circuits have rejected the idea that § 1512 is the exclusive statute for charging witness tampering, and have held that § 1503 (Omnibus Clause) may be used if desired by the government. Keep in mind that the pending proceeding requirement must be met in prosecution under § 1503 (Omnibus Clause).
3. Cases that have held that § 1512 is not the exclusive statute for charging witness tampering:
 - a. United States v. Kenny, 973 F.2d 339 (4th Cir. 1992)
 - b. United States v. Branch, 850 F.2d 1080 (5th Cir. 1988)
 - c. United States v. Wesley, 748 F. 2d 962 (5th Cir. 1984)
 - d. United States v. Tackett, 113 F.3d 603 (6th Cir. 1997)
 - e. United States v. Maloney, 71 F.3d 645 (7th Cir. 1995)
 - f. United States v. Rovetuso, 768 F.2d 809 (7th Cir. 1985)
 - g. United States v. Risken, 788 F.2d 1361 (8th Cir. 1986)
 - h. United States v. Ladum, 141 F.3d 1328 (9th Cir. 1998)
 - i. United States v. Moody, 977 F.2d 1420 (11th Cir. 1992)
4. Cases that have held that § 1512 is the exclusive statute for charging witness tampering:
 - a. United States v. Masterpol, 940 F.2d 760 (2d Cir. 1991)
 - b. United States v. Hernandez, 730 F.3d 895 (2d

Cir. 1984)

VI. FEDERAL FRAUD STATUTES

A. RAPPORT AND OPENING STATEMENT

1. Title 18 U.S.C. §1341, Mail Fraud, Title 18 U.S.C. §1343, Wire Fraud, and Title 18 U.S.C. § 2314, Interstate Transport of Stolen Property (or the National Stolen Property Act) are three of the most important statutes utilized by Federal criminal investigators to combat the full gamut of frauds, schemes and swindles that know no state boundaries. In fact, crimes which would otherwise be purely state or local offenses can gain Federal stature by the simple act of using the United States mails, an interstate commercial carrier, the interstate communications system, or any other facility of interstate commerce.
2. Title 18 U.S.C. §1341 is based on Article I, section 8 of the United States Constitution, which vests authority in the Federal government over "post offices and post roads". By 1872, when the statute was enacted, the United States mails had become the easiest and least expensive means for communicating throughout the country and its territories. Unfortunately, the unscrupulous were quick to capitalize on this new convenience as a mechanism for committing frauds. The advantages of using the mails to commit schemes, frauds and swindles were many: fewer face-to-face transactions, making identification and prosecution more difficult; the availability of rented post office boxes, which allowed those so inclined to operate under a false name in a town where they did not reside; the limited resources of state and local law enforcement authorities, which made investigations of crimes originating in other states difficult to investigate; and the absence of laws that made conduct spanning more than one state illegal. Congress closed that door with the enactment of this statute in 1872.
3. More recently, with the advent of the telegraph, telephone, radio, television and the Internet, as well as improved means to travel in interstate and foreign commerce, creative criminals have devised means of defrauding victims by relying on these various interstate communications facilities and travel means. Schemes have ranged from the religious, such as that perpetrated by Jim and Tammy Faye Bakker, to the "boiler room" scams which target older people and obtain money via telephone using various bullying techniques. New schemes are arising on a daily basis on the Internet. In addition, con artists lure their victims over state lines and from overseas to mislead them face-to-face. As a result, these three statutes remain a vital part of the Federal investigator's arsenal against crime.

B. ENABLING PERFORMANCE OBJECTIVES (EPO)

- EPO #22: Identify the elements of the Mail Fraud statute, Title 18 U.S.C. § 1341, and the Wire Fraud statute, Title 18 U.S.C. § 1343.
- EPO #23: Identify the elements of the National Stolen Property Act, Title 18 U.S.C. § 2314.

C. EPO #22: IDENTIFY THE ELEMENTS OF THE MAIL FRAUD STATUTE, TITLE 18 U.S.C. § 1341, AND THE WIRE FRAUD STATUTE, TITLE 18 U.S.C. § 1343.

1. Title 18 U.S.C. §1341. Titled "Frauds and Swindles", but commonly referred to as the "Mail Fraud Statute", this statute provides as follows:
 - a. *"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both."*
2. Elements of Title 18 U.S.C. §1341. Title 18 U.S.C. §1341 is designed to criminalize the use of the mails to facilitate a fraud, scheme or other illegal plan. In order for a person to be convicted under this statute, the government must prove beyond a reasonable doubt each of the following five elements:
 - a. Any person who

- b. Intentionally
- c. Devises a fraudulent scheme, and
- d. Uses or causes the mails to be used (Postal Service or private/commercial interstate carrier)
- e. In furtherance or in support of the scheme.

American Automotive Accessories, Inc. v. Fishman, 175 F.3d 534, 542 (7th Cir. 1999); Virden v. Graphics One, 623 F.Supp. 1417, 1422-1423 (C.D. Cal. 1985). If these elements are proven and the defendant is found guilty, he/she can be fined up to \$250,000 per count or imprisoned up to 20 years, or both. If the victim or target of the scheme is a financial institution, the fine can be up to \$1,000,000 or imprisonment of up to 30 years, or both.

3. Proof of the Elements of Mail Fraud

- a. What is "intentionally"? An action is proved to have been taken with specific intent if it is proven that "the scheme was reasonably calculated to deceive persons of ordinary prudence and comprehension". Virden, supra, at 1422. How can intent be proven? Intent is proven by showing the scheme itself. The scheme may utilize an affirmative misrepresentation of fact, or may instead involve the deceitful concealment of material facts. Virden, supra.
- b. What is a "fraudulent scheme"? A fraudulent scheme is the intentional presentation of falsehoods as if true, with the goal of causing someone to part with something of value under false pretenses. The words "to defraud" commonly refer to "wronging one in his property rights by dishonest methods or schemes, and usually signify deprivation of something of value by trick, deceit, chicane or overreaching." McNally v. United States, 483 U.S. 350 (1987). Schemes depriving people from controlling their assets by withholding information necessary to make discretionary economic decisions falls within the statute. United States v. Carlo, 507 F.3d 799 (2d Cir. 2007). Does the misrepresentation have to be material to the fraud? Under the holding of Neder v. United States, 527 U.S. 1 (1999), the answer is yes. The Supreme Court pointed out that the well-settled meaning of "fraud" required a misrepresentation or concealment of material fact, and therefore, the materiality of the falsehood is an element of the federal mail fraud statute. Neder, supra at 22 - 23. A matter is material if "(a) a reasonable man would attach importance to its existence or nonexistence in

determining his choice of action in the transaction in question; or (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.” Restatement (Second) of Torts § 538 (1976). A misrepresentation “must have the purpose of inducing the victim of the fraud to part with the property or undertake some action that he would not otherwise do absent the misrepresentation or omission.” United States v. Daniel, 329 F.3d 480, 487 (6th Cir. 2003); (it is material if it has a tendency to influence or is capable of influencing a decision) Neder, supra at 16; United States v. McAuliffe, 490 F.3d 526 (6th Cir. 2007), cert. denied 2007 U.S. LEXIS 11620 (2007). Whether or not a victim in fact relied upon a defendant’s false representation is irrelevant in fraud cases. United States v. Ghilarducci, 480 F.3d 542 (7th Cir. 2007), cert. denied 2007 U.S. LEXIS 10281 (2007).

- c. In 1988, Congress expanded the definition of “scheme or artifice to defraud” when it enacted Title 18 U.S.C. §1346, which states: *“For the purpose of this chapter, the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.”* Thus, no longer does the scheme have to involve the taking of money or tangible personal property, as previously defined in McNally, supra. In a mail/wire fraud case based on a scheme to defraud, misuse of corporate positions for private gain by its executives deprives the corporation/shareholders of honest services. The fact that the inducement was the anticipation of money from a 3rd party and not the corporate employer is no defense, even when the 3rd party never receives a benefit. United States v. Black, 530 F.3d 596 (7th Cir. 2008). This statute can also be used to reach schemes which deprive the public of the honest services of public officials. However, the Circuits are split on their willingness to apply the Mail Fraud statute to cases involving dishonest services.
- d. What act “causes the mails to be used”? It is not necessary to show that the defendant personally used the mail services, but only that the defendant caused the mail services to be used by “acting with the knowledge that their use would follow in the ordinary course of business, or where such use could reasonably be foreseen.” American Automotive Accessories, Inc. v. Fishman, 175 F.3d 534, 542 (7th Cir. 1999), citing United States v. Alexander, 135 F.3d

470, 474-475 (7th Cir. 1998); see also, United States v. Wicker, 80 F.3d 263 (8th Cir. 1996); United States v. Fox, 69 F.3d 15 (5th Cir. 1995). Thus, evidence will be sufficient to meet this element of the offense when it can be proven either that:

- 1) the defendant personally used the mails for the purpose of executing a scheme to defraud; or
- 2) the defendant acted knowing that the use of the mails would follow in the ordinary course of business; or
- 3) even when the use of the mails was not intended, such use was reasonably foreseeable.

Virden v. Graphics One, 623 F.Supp. 1417, 1422 (C.D. Cal. 1985), citing United States v. Garner, 663 F.2d 834, 838 (9th Cir. 1981), cert. denied, 456 U.S. 905 (1982); see also American Automotive Accessories, Inc., *supra*, at 542.

Each mailing which is in furtherance of the scheme is a separate offense, and will support a separate charge. United States v. McClelland, 868 F.2d 704 (5th Cir. 1989). The mailing can be either interstate or intrastate (Article I, section 8, United States Constitution).

- e. What is "in furtherance or in support of the scheme"? The mailings do not have to be an essential part of the planned scheme, but they must be made for the purpose of executing the scheme. Virden v. Graphics One, 623 F.Supp. 1417, 1423 (C.D. Cal. 1985). The mailings do not have to occur at the time of the original fraud. If the defendant is engaged in an ongoing scheme, and the mailings are both reasonably foreseeable and allow the scheme to continue undetected, the defendant can be charged with mail fraud for each mailing that occurs, even if the mailings occur years after the original fraud. United States v. Lane, 474 U.S. 438, 451-2 (1986) (mailings are within the five-year statute of limitations if their purpose is "to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place"); Schmuck v. United States, 489 U.S. 705 (1989) (in odometer rollback scheme, later mailings of titles by state transportation department were reasonably foreseeable and facilitated the continuance of the scheme).

4. Title 18 U.S.C. § 1343. Officially titled "Fraud by Wire, Radio, or Television", this statute is commonly referred to as the "Wire Fraud

Statute". It provides:

- a. *"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both."*
- b. Elements of Title 18 U.S.C. § 1343. Cases consistently state that the elements of Title 18 U.S.C. §§ 1341 and 1343 are the same. American Automotive Accessories, Inc. v. Fishman, 175 F.3d 534, 542 (7th Cir. 1999); United States v. Ames Sintering Co., 927 F.2d 232, 234 (6th Cir. 1990); United States v. Puckett, 692 F.2d 663, 669 (10th Cir.), cert. denied, 459 U.S. 1091 (1982). One substantial difference, however, is that, to be indictable under Section 1343, the wire transmission must have been **interstate**. Puckett, supra. Intrastate telephone calls and transmissions do not violate the statute.
- c. The communication required under the statute does not have to be directed to the victim of the fraudulent scheme, and the defendant does not have to be the person who made the wire communication if he participated in devising the scheme to defraud and the use of interstate wires was foreseeable. United States v. Puckett, 692 F.2d 663, 669 (10th Cir. 1982), cert. denied, 459 U.S. 1091 (1982). The scheme does not have to actually succeed, the victim does not have to actually suffer a loss, nor does the defendant have to secure a gain to be prosecuted under this statute, and the communication itself does not have to actually further the scheme. United States v. Ames Sintering Co., 927 F.2d 232, 235 (6th Cir. 1990). Interstate and international telephone calls seeking a person to execute a horse to complete an insurance scheme supported wire fraud convictions. United States v. Lindemann, 85 F.3d 1232 (7th Cir. 1996), cert. denied, 519 U.S. 966 (1996). Similarly, interstate telephone calls made by patients to schedule appointments with a medical doctor who fraudulently treated them for infertility were properly indicted

as wire fraud charges. *United States v. Jacobson*, 1993 U.S. App. LEXIS 22534 (4th Cir. 1993), cert. denied, 511 U.S. 1069 (1994). Finally, as with the Mail Fraud statute, wire transmissions designed to lull a victim into complacency, thereby keeping him from discovering the fraud and contacting the authorities, can be charged even though they occur after the defendant has obtained something of value from the victim. In effect, these “lulling” wires extend the five-year statute of limitations in a wire fraud case. See, e.g., *United States v. Rogers*, 9 F.3d 1025 (2d Cir. 1993).

D. EPO #23: IDENTIFY THE ELEMENTS OF THE NATIONAL STOLEN PROPERTY ACT, TITLE 18 U.S.C. § 2314

1. Title 18 U.S.C. § 2314. The National Stolen Property Act, commonly referred to as the “Interstate Transport of Stolen Property” or “ITSP”, was enacted to federalize thefts and frauds that crossed state lines. In 1990, the statute was amended to encompass the transportation of stolen goods through foreign commerce. The statute provides as follows:
 - a. *“Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5000 or more, knowing the same to have been stolen, converted or taken by fraud; or*
 - b. *“Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person or persons to travel in, or to be transported in interstate or foreign commerce in the execution or concealment of a scheme or artifice to defraud that person or those persons of money or property having a value of \$5000 or more; or*
 - c. *“Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or*
 - d. *“Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler’s checks bearing a forged countersignature; or*
 - e. *“Whoever, with unlawful or fraudulent intent, transports in*

interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof –

- f. *"Shall be fined under this title or imprisoned not more than ten years, or both.*
 - g. *"This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government. This section also shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of any bank note or bill issued by a bank or corporation of any foreign country which is intended by the laws or usage of such country to circulate as money."*
- 2. Title 18 U.S.C. § 2314 – Generally. Congress enacted the National Stolen Property Act (hereinafter, "ITSP") pursuant to its authority under the Commerce Clause. In general, its provisions prohibit: transporting goods known to be stolen, converted or fraudulently obtained across state lines or our national boundaries; inducing or causing people to travel, or transporting them, across state lines or our national boundaries in furtherance of a fraudulent scheme; and transporting forged securities and traveler's checks across state lines or our national boundaries. The statute converts what were once solely state and local crimes into federal violations, thereby supplementing and enhancing local law enforcement efforts by extending federal law enforcement jurisdiction.
- 3. Elements of Title 18 U.S.C. § 2314. The statute is comprised of five distinct provisions which together proscribe activities involving the transportation of certain specified items and persons across state lines and in interstate commerce. Each such provision requires its own elements of proof and will be considered in order of appearance:
- 4. Paragraph One - The Elements:
 - a. Transportation in interstate or foreign commerce . . .
 - b. Of any goods, wares, merchandise, securities or money valued at \$5000 or more. . .
 - c. Knowing the same to have been stolen, converted or taken by fraud.
- 5. Paragraph One – Proving the Elements:
 - a. Interstate or Foreign Commerce. Generally, a prosecution

for violation of ITSP will not lie unless the property or moneys obtained by theft or fraud have been transported or transferred across state lines or in foreign commerce. Transportation or transfer of such items within a single state does not satisfy the requirements of the statute. It is the transport or transfer of the stolen or fraudulently obtained property or moneys from one state to another or between the United States and a foreign country that violates the statute and confers federal jurisdiction over the crime. Thus, a thief who steals property in Georgia and then transports it to Florida commits a violation of ITSP. If instead he remains in Georgia with the proceeds of his theft, the suspect has violated state law, but not federal law.

- b. Transport, transfer or transmit. The means by which the stolen or fraudulently obtained property or money is transported, transferred or transmitted across state lines is not material. However, the funds/property transferred must be proceeds of the fraud or derived from the proceeds of the fraud. United States v. Poole, 557 F.2d 531 (5th Cir. 1977). The funds or property transferred must be directly traceable to the proceeds of the fraud or directly traceable to the property or funds derived from the proceeds of the fraud. Evidence of commingled proceeds in accounts is insufficient. United States v. Lazarenko, 546 F.3d 593 (9th Cir. 2008). It is sufficient that the defendant transported the item personally or *caused* the item to be transported, transferred or transmitted in interstate or foreign commerce. Pereira v. United States, 347 U.S. 1 (1954). Thus, reliance on a private or commercial courier, or use of the U.S. Mail, thereby causing the interstate transport of the stolen merchandise, satisfies this element of the statute. Furthermore, when an act is performed with knowledge the mail will be used in the ordinary course of business, or where such use can be reasonably foreseen, even though not actually intended, the person "causes" the mail to be used. Likewise, interstate wire transfers of funds obtained through theft or fraud constitute violations of ITSP. The courts have consistently held that ITSP can be charged concurrently with the Mail Fraud and Wire Fraud statutes because they demand proof of at least one different element. Accord Pereira at 9. With regard to foreign commerce, ITSP makes it a crime to transport to the United States goods stolen in a foreign country, even if they do not subsequently travel in interstate commerce once in country. United States v. Davis, 608 F.2d 555 (5th Cir. 1979). Further, property or moneys obtained

by fraud or theft in the United States and then transported or transmitted overseas violate ITSP. The Second Circuit has held that stolen property transported to a restricted customs area by an exporter and placed in the possession of the shipping company was "in foreign commerce" though no borders had been crossed. United States v. Ajlouny, 629 F.2d 830 (2d Cir. 1980), cert. denied, 449 U.S. 1111 (1981).

- c. Value of \$5000 or more. To sustain a conviction under ITSP, the government must prove the stolen or fraudulently obtained property transported in interstate or foreign commerce is valued at \$5000 or more. According to the legislative history of the statute, the purpose of this limitation is to avoid over-extending the resources of the federal government by leaving prosecutions of less substantial thefts and frauds to the states. In addressing the valuation element of ITSP, the courts refer initially to 18 U.S.C. § 2311, which defines "value" as "face, par, or market value, whichever is the greatest" For items with no face or par value, the courts have generally defined market value as "the price a willing buyer would pay a willing seller either at the time and the place that the property was stolen or at any time during the receipt or concealment of the property." United States v. Robinson, 687 F.2d 359, 360 (11th Cir. 1982); accord, United States v. Ruhe, 191 F.3d 376 (4th Cir. 1999). In applying this standard, the courts look to the particular facts of each case and pose the question: in what type of transaction would the person from whom the property was stolen have engaged? If the victim was a wholesale merchant, the value for purposes of ITSP is the wholesale market price; if the victim was a retail merchant, the value of the stolen property is the retail market price. Robinson at 360; United States v. Willette, 764 F.Supp. 759 (N.D.N.Y. 1991). Where there is no established market for the stolen item, courts have relied on the prices paid among those dealing in the stolen property, referring to this as the "thieves market". See, United States v. Berkitt, 619 F.2d 649, 658 (7th Cir. 1980). Finally, each interstate or foreign transport or transfer of an item valued at \$5000 or more can be charged as a separate count of ITSP.
- d. Aggregation. The definition of "value" set forth in 18 U.S.C. 2311 concludes with the statement: ". . . and the aggregate value of all goods, wares, and merchandise, securities and money referred to in a single indictment shall constitute the value thereof." In Schaffer v. United States, 362 U.S. 511 (1960), the Supreme Court considered whether individual

shipments of stolen goods in interstate commerce valued at less than \$5000 could be aggregated to attain the jurisdictional minimum specified by ITSP. Relying on a “sensible reading of the statute” the Court affirmed the notion that “where the shipments have enough relationship so that they may properly be charged as a single offense, their value may be aggregated.” Schaffer at 517. In Schaffer, the aggregated value was based on series of shipments to a particular defendant. Where the shipments were spread among more than one person, the Fourth Circuit aggregated the value of the individual shipments once the government proved they were part of a “common design” (i.e., single plan or agreement). Andrews v. United States, 108 F.2d 511 (4th Cir. 1939).

- e. Knowledge. To obtain a conviction under ITSP, the government must show that the defendant knew that the items he transported or caused to be transported in interstate or foreign commerce were stolen, embezzled, or obtained by fraud. The government is not required to prove that the defendant knew, foresaw, or intended that the stolen items were or would be transported in interstate or foreign commerce. The courts have generally held that the jury may infer that a person in possession of recently stolen property knew the property was stolen, unless such possession is satisfactorily explained. Barnes v. United States, 412 U.S. 837, 845 (1973); see also, United States v. Cowden, 545 F.2d 257 (1st Cir. 1976), cert. denied, 430 U.S. 909 (1977); United States v. McGregor, 529 F.2d 928 (9th Cir. 1976).
6. Paragraph Two – The Elements: The second paragraph of ITSP makes it a federal crime to cause potential victims (or the agent of the victim) of a fraudulent scheme to travel in interstate or foreign commerce to execute or conceal the scheme. This provision of the statute is referred to as prohibiting “travel fraud”. In its most basic application, a con artist who misleads his victim in a face-to-face encounter can still be charged with ITSP if the victim or the victim’s agent crossed state lines or traveled into or out of the United States to investigate or learn of the fraudulent offer and ultimately handed his money or property to the defendant. See, e.g., United States v. Steffen, 251 F.3d 1273 (9th Cir. 2001). The elements of this second paragraph are:
- a. Transportation of or inducement of a person to travel in interstate or foreign commerce . . .
 - b. For the purpose of defrauding that person of money or property valued at \$5000 or more.

7. Paragraph Two – Proving the Elements:

- a. Transport or induce to travel in interstate or foreign commerce. This element of ITSP is met if a potential or actual victim of a fraud scheme travels in interstate or foreign commerce in connection with the scheme. It is not necessary to prove the victim actually parted with their money or property; instead it is sufficient if the defendant induced them to travel in an effort to defraud them. Likewise, the government need not prove that the money or property lost by the victim to the defendant traveled in interstate or foreign commerce. United States v. Benson, 548 F.2d 42, 46 (2d Cir. 1977). Thus, where a con artist induces his next door neighbor to travel out of state to view certain real estate parcels offered in a fraudulent scheme, he can be charged with ITSP whether or not the neighbor invests; further, he can be charged with ITSP based on the interstate travel of the neighbor even if the neighbor does not invest until he returns home and hands his funds to the con artist. (Of course, the U.S. Attorney's decision whether or not to prosecute the case will generally rest on the amount of the *actual* loss suffered by the victims of the scheme).
- b. To Defraud of \$5000 or More. As with the Mail Fraud and Wire Fraud statutes, the government must prove the defendant's intent to defraud. See the prior discussion concerning that element under the Mail Fraud statute above. As to meeting the jurisdictional amount of \$5000 or more, see the discussion concerning the valuation element for Paragraph One above.
- c. Travel Fraud Cases. The following are examples of cases in which defendants have been charged with "travel fraud" under ITSP:
 - 1) United States v. Jacobson, 1993 U.S. App. LEXIS 22534 (4th Cir. 1993), cert. denied, 511 U.S. 1069 (1994) - § 2314 violated by doctor who induced out-of-state patients to travel to his Virginia clinic for fraudulent fertility treatments.
 - 2) United States v. Casperson, 773 F.2d 216 (8th Cir. 1985) – Travel fraud provision of ITSP violated through inducement of investors to travel across state lines in advance fee loan scheme.
 - 3) United States v. Biggs, 761 F.2d 184 (4th Cir. 1985) – Defendant committed travel fraud under ITSP by inducing Florida residents to visit coal mine in West

Virginia for purposes of obtaining fraudulent investments.

8. Paragraph Three – The Elements: The third paragraph of ITSP prohibits the transportation of falsely made, forged, altered or counterfeited securities or tax stamps in interstate and foreign commerce. The government must prove the following elements:
 - a. Transport in interstate or foreign commerce . . .
 - b. Falsely made, forged, altered or counterfeited securities or tax stamps . . .
 - c. With unlawful or fraudulent intent . . .
 - d. Knowing the securities or tax stamps to be forged, altered or counterfeited.
9. Paragraph Three – Proving the Elements:
 - a. Interstate or Foreign Commerce. See discussion above concerning this element under Paragraph One. In addition, as discussed below, this section of ITSP covers the negotiation of forged out-of-state checks. Thus, a defendant who makes payment with a falsely made or forged check drawn on an out-of-state bank can be charged with ITSP based on the subsequent interstate transfer of the check in the bank collection process. Pereira v. United States, 347 U.S. 1 (1954). Further, each act of transporting the subject securities in interstate or foreign commerce constitutes a single offense under ITSP. Thus, a defendant who transports several forged checks or securities at one time may be charged with only one count of ITSP. It is not the number of false securities, but rather the number of state lines crossed that determines the number of counts to be charged. United States v. Frierson, 2000 U.S. App. LEXIS 27939 (10th Cir.). Alternatively, the government may charge as separate counts of ITSP each negotiated check that enters interstate commerce to be processed through the banking system. See, e.g., United States v. Flick, 516 F.2d 489 (7th Cir. 1975), cert. denied, 423 U.S. 931 (1975); United States v. White, 524 F.2d 1249 (5th Cir. 1975), cert. denied, 426 U.S. 922 (1976).
 - b. Falsely made, forged, altered or counterfeited securities. The following have been deemed “securities” for purposes of the third paragraph of ITSP:
 - 1) Checks – see citations above; also, see below, this paragraph of ITSP does not apply to **checks with**

forged endorsements;

- 2) Quit Claim Deeds – United States v. Speidel, 562 F.2d 1129 (8th Cir. 1977), cert. denied, 435 U.S. 915 (1978);
- 3) Money orders – United States v. Weisser, 737 F.2d 729 (8th Cir. 1984), cert. denied, 469 U.S. 1158 (1985);
- 4) Motor vehicle titles with fraudulent odometer readings – Moskal v. United States, 498 U.S. 103 (1990);
- 5) Stocks and bonds – United States v. Anderson, 532 F.2d 1218 (9th Cir. 1976), cert. denied, 429 U.S. 839 (1976); United States v. Taylor, 802 F.2d 1108 (9th Cir. 1986), cert. denied, 479 U.S. 1094 (1987).

The courts have held that airline tickets, credit cards, credit card slips, and leases are not “securities” under ITSP. In addition, the final paragraph of Section 2314 states that the statute’s provisions do not apply to counterfeit obligations and securities of the United States or any foreign government, nor falsely made or counterfeit foreign currency. (See Title 18 U.S.C. § 8 for the statutory definition of “obligation or other security of the United States”). The reason for this exclusion of United States obligations and securities from the provisions of ITSP lies in the fact that “trafficking in counterfeits, forgeries and spurious representations of [these instruments] is made criminal elsewhere in the United States Code by anti-counterfeiting statutes”, such as Title 18 U.S.C. § 471. United States v. Robie, 166 F.3d 444, 454 (2d Cir. 1999). Finally, it should be noted that the language “falsely made, forged, altered or counterfeited securities” has been construed by the courts to not include **checks with forged endorsements**. See, e.g., United States v. Tyson, 690 F.2d 9 (1st Cir. 1982) (finding the forging of an endorsement on an otherwise valid security [here, a check] does not render the security falsely made, forged, altered, or counterfeited for purposes of paragraph three of ITSP). That language however, has been held to apply to checks signed by a maker using a fictitious name, United States v. Seay, 386 F.Supp. 550 (E.D. Ill. 1974) aff’d, 518 F.2d 646 (7th Cir. 1974) (per curiam), cert. denied, 423 U.S. 995 (1975); checks drawn on an account opened with a fictitious name, United States v. Metcalf, 388 F.2d 440 (4th Cir. 1968); checks bearing a forged signature of an authorized signatory to the account, United States v.

Fletcher, 444 F.2d 619 (10th Cir.1971); checks drawn on closed accounts, United States v. Phillips, 869 F.2d 1361(10th Cir. 1988), cert. denied, 490 U.S. 1069 (1989); and checks bearing the actual signature of a person not authorized to act as a signatory on the account, United States v. Fontana, 948 F.2d 796 (1st Cir. 1991). At least one court noted that a check with a forged endorsement would fall under the provisions of the first paragraph of ITSP prohibiting the interstate transport of property stolen, converted or taken by fraud, provided the \$5000 valuation requirement was met. Tyson at 16.

- c. Fraudulent Intent. The government must establish that the defendant transported the forged or counterfeit check or security with unlawful or fraudulent intent. The requisite intent may be established through the defendant's own statements and/or his participation in the scheme to transport or negotiate the securities. See, United States v. Sheridan, 329 U.S. 379 (1946) (requisite intent under predecessor to Section 2314 was met by proof that defendant cashed check drawn on out-of-state bank which he knew to be forged and which entered interstate commerce for collection); United States v. Frierson, 2000 U.S. App. LEXIS 27939 (10th Cir. 2000) (statements to witness and on audiotape concerning defendant's knowledge and evidence of his participation in scheme established requisite intent).
 - d. Knowledge of Forgery or Counterfeit. To sustain a conviction under this paragraph of ITSP, the government must prove the defendant knew the security transported in interstate or foreign commerce was forged or counterfeited at the time of its transportation. See United States v. Resurreccion, 978 F.2d 759 (1st Cir. 1992) (defendant's knowledge that checks were counterfeit established in part by his statements to Customs agents indicating he hoped to obtain only 40% to 80% of the face value of certified checks drawn on a certain foreign bank). It is not necessary to prove in the case of a forged security that the defendant forged the endorsement himself; the government need only show that he knew the instruments he cashed had been forged. United States v. Solomon, 422 F.2d 1110 (7th Cir. 1970), cert. denied, 399 U.S. 911 (1970).
10. Paragraph Four – The Elements: In 1968, at the prodding of the travel industry, Congress amended ITSP to prohibit the transportation in interstate or foreign commerce of traveler's checks bearing forged

countersignatures. The elements of this provision are:

- a. Transporting in interstate or foreign commerce . . .
- b. Any traveler's check bearing a forged countersignature . . .
- c. With unlawful or fraudulent intent.

11. Paragraph Four – Proving the Elements:

- a. Interstate or Foreign Commerce. See above for prior discussions on this jurisdictional requirement.
- b. Forged Traveler's Checks. Interstate transport of traveler's checks with forged countersignatures violates this provision of ITSP. Though the plain language of the statute suggests the traveler's check must be forged and then transported in interstate commerce, the courts have found this provision violated by defendants who stole the traveler's checks, transported them over state lines, and then forged them to negotiate them in the destination state. See, United States v. Bates, 1999 U.S. App. LEXIS 221 (4th Cir. 1999); United States v. McGovern, 661 F.2d 27 (3d Cir. 1981), cert. denied, 454 U.S. 1157 (1982).
- c. Unlawful or Fraudulent Intent. This element has not spawned much discussion by the courts as it pertains to the traveler's check provision of ITSP. It appears the defendant's unlawful or fraudulent intent is inferred from his possession and/or his negotiation of the forged documents.

12. Paragraph Five – The Elements: The final paragraph of ITSP prohibits the interstate transport of any tool, implement or other items used to counterfeit, alter or falsely make any security or tax stamps. While there are few reported decisions construing the elements of this proviso, the plain language of this section suggests that items used to affix authorized signatures, impress official seals or certifications, or imprint face amounts to checks and other securities would be covered if transported in interstate or foreign commerce. One court held that the paper on which a partially completed security was printed did not constitute a tool or implement within the meaning of this paragraph of ITSP.

13. Venue for Violations of Title 18 U.S.C. §§ 1341, 1343 and 2314. Venue for violations of the Mail Fraud statute, Wire Fraud statute and ITSP is governed by Title 18 U.S.C. § 3237, which provides in pertinent part: "Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, . . . may be inquired of and prosecuted in any district from, through, or into which such commerce,

mail matter, or imported object or person moves.”

As a consequence of the foregoing, mail fraud cases may be brought in the district where the subject mail matter is placed in the mail stream, any district through which it travels, or the district in which it is received by the addressee; wire fraud cases may be brought in the districts from which the transmission was sent, through which it passed, and in which it was received; and ITSP may be charged in the districts from which the stolen items or victims originated, through which they traveled, and in which they completed their journey. As a practical matter, however, the stated policy of the Department of Justice is to bring charges under these three statutes at their beginning and ending points, rather than in the districts through which the mail, transmission, victims or property merely passed.

14. Miscellaneous information concerning Mail and Wire Fraud Statutes

- a. Mail Fraud, Wire Fraud and ITSP are qualifying racketeering acts under the Racketeer Influenced and Corrupt Organizations Act (“RICO”), Title 18 U.S.C. § 1961, United States v. Dischner, 974 F.2d 1502 (9th Cir. 1992), cert. denied, 507 U.S. 923 (1993).
- b. Under the Interstate Travel in Aid of Racketeering Act (“ITAR”), Title 18 U.S.C. § 1952, it is unlawful to travel, use the mails, or use any facility in interstate or foreign commerce to promote gambling, untaxed liquor, drugs, prostitution, arson, bribery, or crimes of violence.
- c. Most importantly, all three statutes are “specified unlawful activities” for purposes of the Money Laundering statutes, Title 18 U.S.C. §§ 1956 and 1957. Thus, any use of the illegal proceeds obtained through violations of the Mail Fraud, Wire Fraud and ITSP statutes which furthers continuing violations or conceal those crimes can be charged under various sections of the Money Laundering statutes. The penalties for violations of Sections 1956 and 1957 under the Federal Sentencing Guidelines are substantial; consequently, these charges serve as valuable bargaining chips in negotiating plea agreements with defendants.

VII. FALSE STATEMENTS / THEFT / EMBEZZLEMENT

A. RAPPORT AND OPENING STATEMENT

This course is designed for uniformed officers. It covers one EPO identical to the CITP program, to wit: EPO #11, Identify the elements of Title 18 U.S.C. § 1001. **For the false statements section of this course, the instructor should refer to EPO #11.**

Title 18 U.S.C. § 641 makes it unlawful for anyone to commit a theft, embezzlement or conversion of property belonging to the United States. The statute reads:

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of \$1000, he shall be fined under this title or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

Under Title 18 U.S.C. § 3571, the maximum fine for the felony offense is \$250,000, and the maximum fine for the misdemeanor is \$100,000.

B. ENABLING PERFORMANCE OBJECTIVES (EPO)

EPO #11: Identify the elements of Title 18 U.S.C. § 1001.

EPO #24: Identify the elements of Title 18 U.S.C. § 641.

C. EPO #24: IDENTIFY THE ELEMENTS OF TITLE 18 U.S.C. § 641

1. Title 18 U.S.C. § 641 is a comprehensive statute designed to address four crimes which, at common law, were separate, but by this statute have been combined: Embezzlement, theft, conversion, and receiving stolen property. In each instance, for the offense to have federal jurisdiction, the item that is wrongfully appropriated must have in fact belonged to the United States. United States v. Tailan, 161 F.3d 591 (9th Cir. 1998). Items stolen from a post or Navy exchange are government property. United States v. Towns, 842 F.2d 740 (4th Cir.),

cert. denied, 487 U.S. 1240 (1988); Tailan, *supra*. Postage stamps that are manufactured under a government contract come within the terms of the statute. United States v. Robie, 166 F.3d 444, 452-453 (2d Cir. 1999).

- a. As an example, suppose a government employee is issued a government-owned vehicle that is to be used only for official business. One weekend, while his private vehicle is being repaired, the employee uses the government vehicle to take his wife shopping and out to dinner. What is the crime? Conversion. Is there any intent to permanently deprive the government of the property? The answer is no; however, it was a wrongful use of property belonging to the United States.
 - b. Assume that instead of taking the government vehicle for a night out with his spouse, the same employee sells the car to a friend who knows that it is the employee's government vehicle and that the employee lacks the authority to sell the car. What are the crimes? In this situation, there is theft by the employee, and receipt of stolen property by the friend. When a person responsible for processing and depositing income tax payment checks takes one, properly endorses the check, but then transfers the money from the proper government account to her personal account, the crime is embezzlement.
2. Theft of government property is the wrongful appropriation of government property by a person who has no lawful right to such property. The elements of theft of government property are:
 - a. Defendant knowingly;
 - b. Takes, carries away, or converts to the use of another;
 - c. Something of value belonging to the United States, or made under a contract with the United States.
3. United States v. Forman, 180 F.3d 766 (6th Cir. 1999). It is not necessary that the defendant know the stolen item belongs to the United States; the prosecution need only prove that the defendant knew that he was taking something that did not belong to him, and that in fact, the item taken belongs to the United States. United States v. Crutchley, 502 F.2d 1195, 1201 (3d Cir. 1974). In order to prove that an item belongs to the United States, the government must prove that it had "title to, possession of, or control over" the item. United States v. Tailan, 161 F.3d 591, 592 (9th Cir. 1998), quoting United States v. Long, 706 F.2d 1044, 1049 (9th Cir. 1983).
4. In the case of United States v. Robie, 166 F.3d 444 (2d Cir. 1999), the

items stolen were misprinted postage stamps manufactured by a private printer under a government contract. The court found that, due to the contract terms and the supervision that was maintained over all aspects of the printing process by the U.S. Postal Service, including maintaining strict control over all waste product, the stolen misprinted stamps were indeed property of the United States or any property made or being made under contract for the United States or any department or agency thereof, and thus the theft was properly charged under this statute.

5. When the crime alleged is a felony, one additional element must be proven: the value of the stolen item exceeds \$1,000. In Robie, *supra*, the primary issue was whether stolen misprinted stamps, which were never issued and scheduled for destruction, had a value reaching the felony level. There was substantial evidence that Robie had been able to dispose of the misprinted Richard Nixon stamps for over \$20,000; however, the court said that the stamps could not be valued by the price that was obtained in a "thieves market" because the value had to be set on the date of the theft, not on the date of the sale of the item. In the end, the court determined that the jury was permitted to infer that the stolen stamps had a value greater than their combined face value of \$51.20, and that the jury's finding on this element was supported by the evidence. Id. at 449-452.
6. Where it is reasonable from the facts for a defendant to believe that the government has abandoned property, and the government cannot prove otherwise, a charge of theft of government property will not succeed. Morrisette v. United States, 342 U.S. 246 (1952).
7. Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted, or into whose hands it has lawfully come. The original taking of the property is lawful, or done with the express or implied consent of the owner, but once the property is lawfully acquired, the defendant fraudulently applies the money or property to another, illegal use. The elements of embezzlement are:
 - a. The money or property belongs to the United States or an agency thereof;
 - b. The money or property came into the possession or care of the defendant lawfully;
 - c. The defendant fraudulently appropriates the money or property to his/her own use or the use of others; and
 - d. The defendant does so knowingly and willfully with the intent to either temporarily or permanently deprive the United States of the use of the money or property so taken.
8. Note that with embezzlement, the original acquisition of the property or money is lawful; there is no fraud or scheme or crime committed in the

original entrustment of the money or property. It is only after the entrustment occurs that the defendant begins the fraud. The defendant must be proven to know that the money or property does not belong to the defendant, and that knowing this fact, the defendant deliberately uses the item for his/her own purpose, either temporarily or permanently depriving the government of the use of the item. If the crime is alleged to be a felony, the government must also prove that the value of the property embezzled is over \$1,000.

9. Criminal conversion is the wrongful deprivation of goods or personal property belonging to another. It includes the unlawful assumption and exercise of the right of ownership over goods or personal property belonging to another, the alteration of their condition, or the exclusion of the owner's rights. The property can be converted either permanently or for an indefinite period of time. Conversion does not require an intent to keep the property, nor does it require a wrongful taking. Conversion may include misuse or abuse of property, as well as use in an unauthorized manner or to an unauthorized extent. The elements of conversion are:
 - a. Wrongful deprivation, use or abuse;
 - b. Of goods or personal property;
 - c. Belonging to the United States.
10. Conversion of government property requires some act inconsistent with the government ownership rights in the property. The conversion may include some abuse or misuse of property, or use of government property in some unauthorized manner. There is no requirement that the defendant intend to keep the property or deprive the government of the property. There is also no requirement that the taking of the property be wrongful. If the value of the property is over \$1,000, the crime is a felony.
11. What acts do not qualify as conversions of government property? In United States v. Wilson, 636 F.2d 225 (8th Cir. 1980), Wilson used a government secretary to type personal work for him relating to a business he was establishing. Many weeks, almost 100% of the secretary's time was spent doing Wilson's personal work. Wilson told the secretary that she was not to allow his personal work to interfere with government work. No attempt was made to conceal what was happening. This all took place during a period when there was almost no government work to be done, due to a reorganization. On these facts, the court held that the government had not shown that Wilson possessed the intent required for a conviction under Title 18 U.S.C. § 641, because he had not interfered with the rights of the government to the secretary's work.

12. Receipt of stolen property can be charged when a person knowingly receives or buys stolen property with intent to keep for his or her own use or gain (i.e., to sell for profit). In addition, the statute allows a person to be charged with receipt of stolen property when that person knowingly receives property that the person knows is stolen. The person receiving the stolen property does not need to know that the stolen property belongs to the United States, but only that the property is stolen. If the value of the property is over \$1,000, the crime is a felony.

VIII. SUMMARY

A. REVIEW OF PERFORMANCE OBJECTIVES

Each of the following sessions is taught as an individual course. The Instructor must remember to cover all of the material contained within that individual course during the time assigned for that course.

B. REVIEW OF TEACHING POINTS

The Instructor should refer to each EPO and session for the teaching points to be reviewed at the end of that session.

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United States v. Wilson, 636 F.2d 225 (8th Cir. 1980)
 18 U.S.C. § 641

TEST ITEM CONTROL SHEET (TICS)

COURSE NUMBER: 1091
TITLE: Federal criminal law

COURSE

Point of contact and extension: (b)(6),(b)(7)(C) Date: March 10, 2008

Instructions: If a course is taught in sessions, put the EXAM number (E01, E02, E03, etc...) that the EPO will be tested on in the EDT. If all EPO's are tested on one exam, place an X in each box instead of the exam number. Using the test item numbers EAD has provided, complete the table below. Every EPO tested by multiple choice exam must be represented in each set with **one** test item. If an EPO is tested by PE or not tested at all put PE or NA in that corresponding EPO row in the program box. A TICS and EDT is required for all courses tested at all FLETC locations. Use more than one form if necessary.

Exam Distribution Table (EDT)

EPO	Set A	Set B	Set C	Set D	Set E	CITP	ICE_D	LMPT	UPTP
1.	I02891	I02899	I05254	I05154	I03086	E01	E02	E05	E05
2.	I02895	I02897	I06477	I06478	I06479	E01	E02	E05	E05
3.	I00742	I06480	I06481	I06482	I06483	E01	E02	E05	E05
4.	I02999	I06484	I06485	I06486	I06487	E01	E02	E05	E05
5.	I03000	I01235	I01237	I01233	I06488	E01	E02	E05	E05
6.	I01330	I01335	I01336	I06227	I06489	E01	E02	E05	E05
7.	I01331	I01337	I02270	I06228	I06490	E01	E02	E05	E05
8.	I03443	I03444	I03432	I05715	I05716	E01	E02	E05	E05
9.	I02204	I02208	I05261	I05262	I06491	E03	E02	NA	NA
10.	I02203	I02205	I02206	I02207	I05260	E03	E02	NA	NA
11.	I02193	I02192	I02191	I06492	I06493	E03	E02	E05	E05
12.	I07049	I01780	I01765	I05243	I06494	E03	NA	NA	NA
13.	I07575	I01779	I01776	I01775	I01761	E03	NA	NA	NA
14.	I01755	I01771	I07050	I05543	I01772	E03	NA	NA	NA
15.	I01756	I01764	I05245	I05244	I01763	E03	NA	NA	NA
16.	I01754	I05247	I01760	I05246	I06495	NA	NA	NA	NA

17.	I07048	I01757	I01777	I06496	I06497	E03	NA	NA	NA
18.	I01788	I01791	I05454	I01795	I01790	E03	NA	E05	E05
19.	I02941	I02946	I05319	I06498	I06499	E03	NA	NA	NA
20.	I02949	I05320	I05408	I05409	I05410	E03	NA	NA	NA
21.	I05411	I05412	I05413	I05321	I02947	E03	NA	NA	NA
22.	I02195	I02196	I01784	I06500	I06501	E05	NA	NA	NA
23.	I06502	I06503	I06504	I06505	I06506	E05	NA	NA	NA
24.	I02137	I02138	I02139	I06507	I06508	E03	NA	E05	E05

EPO	Set A	Set B	Set C	Set D	Set E	ICITP	A_ BPOTP	A_ FAMTP	C_ NNSA_OST
1.	I02891	I02899	I05254	I05154	I03086	E01	E01	E02	E01
2.	I02895	I02897	I06477	I06478	I06479	NA	E01	E02	E01
3.	I00742	I06480	I06481	I06482	I06483	NA	E01	E02	E01
4.	I02999	I06484	I06485	I06486	I06487	E01	E01	E02	E01
5.	I03000	I01235	I01237	I01233	I06488	NA	E01	E02	E01
6.	I01330	I01335	I01336	I06227	I06489	NA	E01	NA	NA
7.	I01331	I01337	I02270	I06228	I06490	NA	E01	NA	NA
8.	I03443	I03444	I03432	I05715	I05716	NA	E01	NA	NA
9.	I02204	I02208	I05261	I05262	I06491	NA	NA	NA	NA
10.	I02203	I02205	I02206	I02207	I05260	NA	NA	NA	NA
11.	I02193	I02192	I02191	I06492	I06493	E01	NA	NA	NA
12.	I07049	I01780	I01765	I05243	I06494	NA	E01	NA	NA
13.	I07575	I01779	I01776	I01775	I01761	NA	E01	NA	NA
14.	I01755	I01771	I07050	I05543	I01772	NA	E01	NA	NA
15.	I01756	I01764	I05245	I05244	I01763	NA	E01	NA	NA
16.	I01754	I05247	I01760	I05246	I06495	NA	NA	NA	NA
17.	I07048	I01757	I01777	I06496	I06497	NA	E01	NA	NA
18.	I01788	I01791	I05454	I01795	I01790	E01	E01	NA	NA
19.	I02941	I02946	I05319	I06498	I06499	NA	NA	NA	NA
20.	I02949	I05320	I05408	I05409	I05410	NA	NA	NA	NA
21.	I05411	I05412	I05413	I05321	I02947	NA	NA	NA	NA
22.	I02195	I02196	I01784	I06500	I06501	NA	NA	NA	NA
23.	I06502	I06503	I06504	I06505	I06506	NA	NA	NA	NA
24.	I02137	I02138	I02139	I06507	I06508	NA	NA	NA	NA

Implementation Instructions for EAD:

Program Name	Date for item implementation	Use in all classes after class #	Special Instructions

U.S. DEPARTMENT OF HOMELAND SECURITY
FEDERAL LAW ENFORCEMENT TRAINING CENTER
OFFICE OF MISSION SUPPORT
LEGAL DIVISION



Homeland Security

LESSON PLAN

FEDERAL CRIMINAL LAW

1091

AUG/11

Revised by: (Jun/06)

(b)(6),(b)(7)(C)

Senior Instructor

WARNING

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Legal Division

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(b)(6),(b)(7)(C)

Senior Instructor

Legal Division

Revised by: (Jun/08)

(b)(6),(b)(7)(C)

Senior Instructor

Legal Division

Revised by: (Jun/09)

(b)(6),(b)(7)(C)

Senior Instructor

Legal Division

Revised by: (AUG/10)

(b)(6),(b)(7)(C)

Attorney-Advisors

Legal Division

LESSON PLAN UPDATE NOTE: The TPO/EPO language has been revised to ensure it comports with the teaching/testing process (there is no actual change regarding the way the material is presented or tested). A new EPO (false claims) has been added to support the IA/TP training program set forth in lesson plan 1153 (however it has not been formally implemented to date).

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Revised by: (AUG/11)

TK (b)(6),(b)(7)(C) LLM

Attorney – Advisor / Instructor

Legal Division

LESSON PLAN UPDATE NOTE: This lesson plan has been modified to incorporate LSN PLN 1365 (False Identification) and LSN PLAN 1093 (Drug Offenses) into one lesson plan (Federal Criminal Law - 1091). The lesson plan case law has been updated as needed. Case citations have been updated via the LEXIS citation function. Although no longer part of the formal instruction, the materials pertaining to obstruction of justice remain in the lesson plan as a reference for instructor use during Phase 6. EPO #25 (False Claims) was created to support an IAITP training program (pilot program) under Lesson Plan 1153. EPO #25 (False Claims) is not presently being used, but is being maintained in the lesson plan for future use / reference. Information on criminal jurisdiction in Indian Country has been added as reference material and is set forth in **Attachment A.**

DOI_LMITP: THIS PROGRAM HAS BEEN ADDED TO THE SYLLABUS. IT CONSISTS OF 4 HRS: (CONSPIRACY / FRAUD / FALSE STATEMENTS).

A_BPOTP & A_BIA_BPOBTP: THESE PROGRAMS ARE NO LONGER COVERED BY THIS LSN PLN

There are no substantive changes involving materials taught to students.

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SYLLABUS

COURSE TITLE: FEDERAL CRIMINAL LAW

COURSE NUMBER: 1091

COURSE DATE: AUG/11

LENGTH OF PRESENTATION:

	LECTURE	LAB	P.E.	TOTAL	PROGRAM
A	14			14	CITP (includes 1hr CBT-THEFT and 1hr CBT – False Identification)
B	2			2	FWSR_LESB, NCIS_CTTTP
C	7			7	LMPT, UPTP
D	2			2	ICITP
E	2			2	**USFS_DETP
F	6			6	IPOTP
G	7			7	ICE-D
H	4			4	FWSL_WIBS
I	4			4	DOI_LMITP
J	6			6	A_FAMTP

CITP / UPTP / ICE_D: THESE PROGRAMS HAVE DIFFERENT EPOS FOR FCL#3.

****USFS_DETP: UNITED STATES FOREST SERVICE, DRUG ENFORCEMENT TRAINING PROGRAM IS AN ADVANCED COURSE OF 24 STUDENTS. INSTRUCTORS MUST COVER FIREARMS AND DRUG OFFENSES IN 2 HOURS.**

DOI_LMITP CONSISTS OF 4 HRS (CONSPIRACY/FRAUD/FALSE STATEMENTS)

IFITP: THE PROGRAM COVERS EPOS: #1 / 11 / 22 / 24 / 26 FROM THIS LESSON PLAN. NOTE OTHER NON-FCL EPOS TAUGHT IN THIS BLOCK OF INSTRUCTION WHICH IS 3 HRS LONG. SEE LESSON PLAN 1153 FOR GUIDANCE.

FWSL_WIBS: 24 STUDENT WILDLIFE INSPECTOR COURSE (TESTABLE)

A_BPOTP / A_BIA_BPOBTP: THESE PROGRAMS ARE NO LONGER COVERED BY THIS LSN PLN

A_FAMTP: THIS PROGRAM RECEIVES FEDERAL CRIMINAL LAW (FCL) 1 - 3.

A_LMPT: THIS PROGRAM RECEIVES FEDERAL CRIMINAL LAW (FCL) 1 - 3 AND DRUG OFFENSES.

DESCRIPTION:

Through lecture and discussion, this course provides the student with an introduction to criminal law and selected Federal offenses. This course is actually a series of independently taught sessions. These course sessions may be taught by different instructors, so it is imperative that all objectives are covered during the time scheduled.

This Lesson Plan covers material provided to many different programs for federal officers. Because of this, the EPOs are outlined below with a designation as to which EPOs are to be taught in each course. A generalized outline of course sessions has also been provided for the benefit of the instructor. These should be used only as a general guide. The EPO list should be referred to in determining precisely what material to teach to a specific student group. Instructors will be best served if they treat this Lesson Plan as an encyclopedia of several different courses, the course sessions as a rough guide, and the EPO list as the definitive list of material to cover in a particular course.

TERMINAL PERFORMANCE OBJECTIVE (TPO):

Given a set of facts depicting possible federal criminal offenses, the student will identify if a crime is properly alleged and if so, determine if all the elements of the crime are present that will allow a federal prosecution in accordance with applicable Federal statutes and case law.

ENABLING PERFORMANCE OBJECTIVES (EPO):

Master EPO	EPO	Numbers indicate the session(s) in which the EPO is taught.									
Introduction to Criminal Law / Assault / Bribery (2 hours)		A	B	C	D	E	F	G	H	I	J
1	Identify and apply the elements of a criminal statute.	1	X	1	X		1	1	1		X
2	Distinguish between a felony and a misdemeanor.	1	X	1			1	1	1		X
3	Identify and apply the Assimilative Crimes Act and distinguish between exclusive, concurrent, and proprietary jurisdiction.	1	X	1			1	1	1		X
4	Identify and apply the elements of Title 18 U.S.C. §111.	1	X	1	X		1	1	1		X
5	Identify and apply the elements of Title 18 U.S.C. §201.	1	X	1			1	1	1		X

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Federal Firearms Violations (2 hours)		A	B	C	D	E	F	G	H	I	J
6	Identify categories of individuals prohibited from possessing firearms.	2		2		X	2	2			X
7	Identify and apply procedures to initiate a firearms trace through the Bureau of Alcohol, Tobacco, & Firearms.	2		2		X	2	2			X
8	Identify the weapons listed in Title 18 U.S.C. §922(a)(4) that require registration with the Bureau of Alcohol, Tobacco, & Firearms and those weapons prohibited on a federal facility.	2		2		X	2	2			X
Entrapment (SEE TEACHING NOTE AT END OF CHART)		A	B	C	D	E	F	G	H	I	J
9	Identify when an inducement by the government is permitted or prohibited.	3						3			
10	Identify when predisposition negates an apparent entrapment defense.	3						3			
False Statements (SEE TEACHING NOTE AT END OF CHART)		A	B	C	D	E	F	G	H	I	J
11	Identify and apply the elements of Title 18 U.S.C. §1001.	3		3	X		3	3	2		X
Conspiracy (4 hours) Taught to CTP in conjunction with Parties		A	B	C	D	E	F	G	H	I	J
12	Identify how many persons are needed to form a conspiracy.	4/5									
13	Identify when knowledge and intent are sufficient to constitute a conspiracy.	4/5									
14	Identify an agreement and its functions according to the provisions of Title 18 U.S.C. §371.	4/5									
15	Identify the function of an overt act in the crime of conspiracy.	4/5									
16	Identify when a co-conspirator's statement may be used during the prosecution of a conspiracy. [Not currently taught in any program] [Instructor background material]										
17	Identify the limits of the withdrawer's or late joiner's criminal liability.	4/5									X

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Parties (included with conspiracy in Option A included in Theft / False Statements with Option C) Taught to CITP in conjunction with Conspiracy		A	B	C	D	E	F	G	H	I	J
18	Identify when a person may be prosecuted for assisting another in the commission of a crime, in accordance with Title 18 U.S.C. §§2-4.	4/5		3	X		2				X
Obstruction of Justice # (REFER TO MATERIAL DURING CITP PHASE 6)		A	B	C	D	E	F	G	H	I	J
19	Identify conduct that can be prosecuted under Title 18 U.S.C. §§1503 and 1510.	#									
20	Identify the groups of persons who are protected under Title 18 U.S.C. §§1512 and 1513.	#									
21	Identify conduct that constitutes "tampering," in violation of Title 18 U.S.C. §1512 and conduct that constitutes "retaliation" in violation of Title 18 U.S.C. § 1513.	#									
Federal Fraud Statutes (2 hours) Taught as FCL 6 to CITP		A	B	C	D	E	F	G	H	I	J
22	Identify and apply the elements of the Mail Fraud statute, Title 18 U.S.C. §1341 and the Wire Fraud Statute, Title 18 U.S.C. §1343.	6								X	
23	Identify and apply the elements of the National Stolen Property Act, Title 18 U.S.C. § 2314.	6								X	
Theft		A	B	C	D	E	F	G	H	I	J
24	Identify and apply the elements of Title 18 U.S.C. §641.	C B T		3			3		2		X
False Claim		A	B	C	D	E	F	G	H	I	J
25	Identify and apply the elements of presenting a false, fictitious or fraudulent claim										
	FALSE IDENTIFICATION										
26	Identify and apply selected offenses under 18 U.S.C. §1028, the False Identification Crime Control Act of 1982	C B T									

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27	Identify the penalties that may be imposed pursuant to selected provisions of 18 U.S.C. §1028, the False Identification Crime Control Act of 1982	C B T									
	DRUG OFFENSES										
28	Identify and apply the elements of 21 U.S.C. §844	3		X		X		X			
29	Identify and apply the elements of 21 U.S.C. §841	3		X		X		X			

CITP FCL 3: includes entrapment / false statements / drug offenses - theft is taught via CBT

UPTP FCL3: includes theft / false statements / parties

LMTP FCL3: includes theft / false statements / parties

ICE_D FCL3: includes entrapment / false statements

- Obstruction is referenced during Phase 6 (Brief to AUSA)

STUDENT SPECIAL REQUIREMENTS:

For each Session, students will refer to the corresponding section of the student text.

METHOD OF EVALUATION:

Written, multiple-choice examination.

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INSTRUCTOR GUIDE

METHODOLOGY:

Lecture

Question and answer

TRAINING AIDS:

1. Instructor: PowerPoint / Overhead Projector
2. Student: Student text

SPECIAL INSTRUCTOR REQUIREMENTS:

NONE

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OUTLINE OF INSTRUCTION

I. INTRODUCTION TO CRIMINAL LAW / ASSAULT / BRIBERY

A. RAPPORT AND OPENING STATEMENT

1. Criminal law is a very broad legal area. While officers should strive to learn every aspect of criminal law which applies to their job, it is not possible for a new officer to become an expert in criminal law during a brief training period. This course provides an overview of the fundamentals of criminal law and training on selected Federal criminal offenses.
2. This first block of instruction covers Introduction to Criminal Law, Assault, and Bribery. Bribery (18 U.S.C. §201) is not an EPO for all students. Instructors should refer to the master list and teach the Bribery EPO only to those students who are required to receive this instruction.

B. TERMINAL PERFORMANCE OBJECTIVE (TPO)

Given a set of facts depicting possible federal criminal offenses, the student will identify if a crime is properly alleged and if so, determine if all the elements of the crime are present that will allow a federal prosecution in accordance with applicable Federal statutes and case law.

C. ENABLING PERFORMANCE OBJECTIVES

EPO #1: Identify and apply the elements of a criminal statute.

EPO #2: Distinguish between a felony and a misdemeanor

EPO #3: Identify and apply the Assimilative Crimes Act and distinguish between exclusive, concurrent, and proprietary jurisdiction.

EPO #4: Identify the elements of Title 18 U.S.C. §111.

EPO #5: Identify the elements of Title 18 U.S.C. §201.

D. EPO #1: IDENTIFY AND APPLY THE ELEMENTS OF A CRIMINAL STATUTE

1. Criminal law is a foundation of the criminal justice system. The subject of criminal law studies what actions are criminally punishable by the government. A crime is an act, or failure to act, punishable by the government. Typical crimes include robbery, rape, burglary, and murder. Crimes are different from torts in that criminal actions are brought by the government for the purpose of punishing the wrongdoer and deterring others from similar conduct. A tort is a civil action for compensation. For example, if a criminal committed a burglary, the government could prosecute him and place him in jail. In a tort action, the victim could sue the wrongdoer for an intentional tort to recover his stolen items.
2. All criminal statutes in the United States are in writing. Each statute contains elements, or components. Each of these elements must be met for the crime to have been completed. At trial the prosecution must prove all the elements of a crime beyond a reasonable doubt to obtain a conviction. Most crimes require a criminal intent and criminal act. In other words, an individual must both intend to commit a crime and then act in furtherance of that intent. However, that is not true in all cases. For example, a parent could be criminally charged with child abuse for not acting to care for his child.
3. Motive is a very important fact for the investigator and prosecutor. It can be used to solve crimes by identifying potential perpetrators and to prove criminal intent. However, motive is usually never an element of a crime. So-called "hate crime" legislation aimed at those who target certain individuals for assault (minorities, homosexuals, etc.) is an exception to this rule. While brief reference may be made to these laws in class, the issues raised by considering motive in prosecuting "hate crimes" is beyond the scope of this course.
4. A crime contains an *actus reus* (act) and, usually, a *mens rea* (intent or state of mind). More specifically, a person may not be convicted of an offense unless the prosecutor proves beyond a reasonable doubt that the defendant, with the requisite mental state, performed a voluntary act and proximately caused the proscribed social harm (crime). Except in rare circumstances, a person is not guilty of an offense unless he performs a voluntary act (or omits an act that is his legal duty to perform) that causes social harm (*actus reus*), with a guilty mind (*mens rea*).

- a. *Actus Reus* – means the act itself (i.e., assault, killing, stealing, etc.)
 - b. Definitions of *Mens Rea* (mental state)
 - 1) Broadly defined as a general immorality of motive, vicious will or an “evil-meaning mind.”
 - 2) Narrowly defined as “the particular mental state provided for in the definition of the offense.” This is more commonly referred to as the “Elemental” meaning of *mens rea*.
 - a) Example – murder is defined as “the intentional killing of a human being by another human being.”
 - (1) *Actus reus* is the killing of a human being by another human being.
 - (2) *Mens rea* is that the killing was intentional.
 - 3) Common *Mens Rea* (criminal act) terms:
 - a) Intentionally
 - b) Willfully
 - c) Negligently
 - d) Recklessly
 - e) Maliciously
5. There are two kinds of Criminal Intent
- a. General Intent – any offense for which the only mens rea required was blameworthy state of mind. No specific mental state is required in the definition of the crime.
 - b. Specific Intent - the definition of the offense expressly required proof of a particular mental state. The definition of the crime (1) includes the intent to do some future act, or achieves some further consequence (i.e., a special motive for the conduct), beyond the conduct or result that constitutes the *actus reus* of the offense, or (2) provides that the actor must be aware of a statutory attendant circumstance.
6. There are three basic elements to any criminal statute:
- a. An Act or Failure to Act (*actus reus*)

- b. A Criminal Intent (*mens rea*)
 - 1) General Intent; or
 - 2) Specific Intent
 - c. A Penalty or Punishment by the Government
7. The elements of crimes are best explained by example. The federal crime of murder, 18 U.S.C. §1111 requires “the unlawful killing of a human being with malice aforethought.” Murder requires a criminal intent, malice aforethought. Murder also requires a criminal act, to wit: the unlawful killing of a human being. This statutory construction is typical of criminal statutes in the United States.
8. All criminal statutes also require a penalty. Without penalties, our criminal system would have no meaning. These penalties can include fines, probation, incarceration and death. Most criminal statutes provide a range of potential penalties, based on the severity of the offense.

E. EPO #2: DISTINGUISH BETWEEN A FELONY AND A MISDEMEANOR

- 1. Crimes are distinguished by the potential penalty faced by the criminal. In general, both the federal government and the States define a felony as an offense punishable by over one year in prison. A misdemeanor is an offense punishable by no more than a year in prison.
- 2. 18 U.S.C. §3559 specifically classifies federal sentences. A felony is an offense for which the maximum term of imprisonment authorized is more than one year. A misdemeanor is an offense for which the maximum term of imprisonment is one year or less.

F. EPO #3: IDENTIFY AND APPLY THE ASSIMILATIVE CRIMES ACT AND DISTINGUISH BETWEEN EXCLUSIVE, CONCURRENT AND PROPRIETARY JURISDICTION

- 1. Jurisdiction relates to the legal authority to act where the crime was committed. The authority of the United States (and therefore its law enforcement officers) depends on the type of jurisdiction applicable to a certain area. Within the boundaries of the United States, there are three basic types of jurisdiction. These are exclusive jurisdiction, concurrent jurisdiction, and proprietary jurisdiction. Before examining jurisdiction it is necessary to determine what type of federal law is to be enforced.
- 2. Types of Federal Laws

- a. Laws of General Application: Laws passed by Congress that are "necessary and proper" for the conduct of its business. (There is some federal connection, and regardless of where the crime occurs, the defendant can be prosecuted by the Federal Government).
 - b. Examples of laws of general application: 18 U.S.C. §111 Assault on Federal Employee; 18 U.S.C. §641 Theft of Government Property; 18 U.S.C. §371 Conspiracy; 18 U.S.C. §201 Bribery; 18 U.S.C. §1001 False Statements.
 - c. Other Federal Laws: where the location of the offense matters. These statutes only apply on certain federal land where the federal government has jurisdiction.
 - d. Examples: 18 U.S.C. §1852 Timber removed or transported (. . . that is growing on the public lands of the United States . . .); 18 U.S.C. §1853 Trees cut or injured (. . . growing upon any land of the United States . . .); 18 U.S.C. §661 Theft of Non-Government Property (within the special maritime and territorial jurisdiction) of the United States.
3. Federal Jurisdiction: There are several ways the Federal government obtains the right to enforce its laws on land acquired within a state.
- a. Article 1, §8, Clause 17 of the United States Constitution.
 - 1) "The Congress shall have Power...To exercise exclusive Legislation in all cases whatsoever, over such District (not exceeding ten Miles square) as may, by cession of particular States, and the Acceptance of Congress, become the seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful Buildings; --"
 - b. Other Methods of Acquiring Jurisdiction:
 - 1) Federal reservation (often lands always held in Federal ownership);
 - 2) State cession of land to the Federal government for post offices, military installations, prisons, etc. (particularly prior to 1940)

- 3) Title 40 U.S.C. §3112. Until jurisdiction has been accepted by the government, jurisdiction is not presumed. Acceptance is based on compliance with state law procedures.
 - 4) Basic Constitutional Authority for Land Management Agencies: The Property Clause. In sum, the Property Clause of the Constitution provides that: *"The Congress shall have Power to dispose of and make all needful rules and Regulations respecting the Territory or other Property belonging to the United States..."* U. S. Const., art. IV, §3, Cl.2.
- c. Exclusive Jurisdiction: Exclusive jurisdiction exists where the Federal government has received, by whatever method, all the law enforcement authority of the State with no reservations made to the State. The Federal government conducts all law enforcement activities within these types of areas. State and local law enforcement have no jurisdiction to enforce laws in these areas. Examples areas of exclusive jurisdiction are Yellowstone National Park, and some Federal buildings and military installations.
 - d. Concurrent Jurisdiction: Concurrent jurisdiction exists where a State has granted law enforcement authority to the United States while reserving to itself the right to exercise full law enforcement authority over the area concurrently. In areas of concurrent jurisdiction, both State and Federal Governments may conduct law enforcement activities and may prosecute for criminal violations in their respective court systems. Examples of areas of concurrent jurisdiction are Cape Canaveral National Sea Shore, Grand Canyon National Park, and some military installations.

- e. Proprietary Jurisdiction: Proprietary jurisdiction exists where the Federal government has acquired some right or title to lands but has not obtained any measure of the State's authority over the area. The Federal government may buy or lease the property, but generally has rights equivalent to a private landowner. However, under the Supremacy and Property Clause of the United States Constitution, Federal law enforcement officers may enforce laws of general application and Federal regulations enacted to protect these areas. United States v. Bohn, 622 F.3d 1129 (9th Cir. 2010). Most Forest Service and BLM lands in the western United States are considered owned under proprietary jurisdiction. As public land in the West was withdrawn from entry and private ownership to create the National Forests, Congress made it clear that the affected States would not lose jurisdiction over these properties. Title 16 U.S.C. §480 states:

"The jurisdiction, both civil and criminal over persons within National Forests shall not be affected or changed by reason of their existence except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the state wherein any such National Forest is situated shall not, by reason of the establishment thereof, lose its jurisdiction nor the inhabitants thereof, their rights and privileges as citizens or be absolved from their duties as citizens of the state."

4. Assimilative Crimes Act. The Assimilative Crimes Act (Title 18 U.S.C. §13) comes from the word "assimilate", which means to take in and incorporate as one's own; to absorb. The first such law was passed in 1825. The present act was passed in 1948, and last amended in 1996. It provides, in pertinent part, that:

- a. "Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in §7 of this title [the statute defining "special maritime and territorial jurisdiction of the U.S."], or on, above, or below any portion of the territorial sea of the United States not within the jurisdiction of any State, Commonwealth, territory, possession, or district is guilty of any act or omission which, although not made punishable by enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment."
 - b. "... for purposes of subsection (a) of this section, that which may or shall be imposed through judicial or administrative action under the law of a State, territory, possession, or district, for a conviction for operating a motor vehicle under the influence of a drug or alcohol, shall be considered to be a punishment provided by that law.
 - c. Any limitation on the right or privilege to operate a motor vehicle imposed under this subsection shall apply only to the special maritime and territorial jurisdiction of the United States."
5. Policy Behind the Statute. The policy behind this statute is to afford those persons on Federal enclaves the same protection as citizens within the surrounding State, and allow State law to become Federal law when there is no Federal law available. The Assimilative Crimes Act allows acts to be prosecuted in Federal court which:
- a. Are a violation of State law,
 - b. Committed on property where the United States has either exclusive or concurrent jurisdiction and
 - c. There is no Federal law available to charge.
6. Assimilation is not available in areas of proprietary jurisdiction. Officers must first know if they are operating within an area of exclusive or concurrent jurisdiction in order to know if they can assimilate state laws.

7. A Federal Crime Must Not Exist. The Assimilative Crimes Act *operates only when Federal law has not defined the criminal offense.* United States v. Dotson, 615 F.3d 1162 (9th Cir. 2010). When a Federal statute or regulation exists prohibiting the conduct, officers cannot use the Assimilative Crimes Act to enlarge or narrow the scope of the crime.

TEACHING NOTE ON INDIAN COUNTRY JURISDICTION

Charging a defendant in both Federal and Tribal Court is **NOT** a violation of Double Jeopardy: The U.S. Supreme Court has held that the source of the power to punish offenders is an inherent part of tribal sovereignty and not a grant of federal power. Thus, when two prosecutions are by separate sovereigns, (e.g. the Navajo Nation and the United States), the subsequent federal prosecution does not violate the defendant's right against double jeopardy. United States v. Wheeler, 435 U.S. 313 (1978).

**See Attachment A
Indian Country Jurisdiction**

G. EPO# 4: IDENTIFY AND APPLY THE ELEMENTS OF TITLE 18 U.S.C. §111.

1. Every year, Federal law enforcement officers are assaulted in the line of duty. In order to deter offenders and punish them for using violence against federal officers and employees, Congress enacted 18 U.S.C. §111 entitled, Assaulting, resisting, or impeding certain officers or employees.

2. By common law definition, an assault is any willful attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability to do so, and any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm. A battery is intentional and wrongful non – consensual physical contact (touching) by a person (or an object controlled by that person) with another person. Most modern statutes and 18 U.S.C. § 111 use the term “assault” to include both the common law acts of assault and battery. The statute however protects federal officers by punishing assaults as well as interference with federal law enforcement activities to ensure the integrity of federal operations by punishing obstruction and other forms of resistance. United States v. Williams, 602 F.3d 313 (5th Cir. 2010). Note: Circuits disagree as to whether or not a misdemeanor conviction requires assaultive conduct. The 6th Circuit does not, United States v. Gagnon, 553 F.3d 1021, 1026 (6th Cir. 2009), where as the 9th Circuit, United States v. Chapman, 528 F.3d 1215, 1221 (9th Cir. 2009) and the D.C. Circuit, United States v. Arrington, 309 F. 3d 40, 44, (D.C. Cir. 2002) do. The 8th Circuit does as well. United States v. Schrader, 10 F.3d 1345, 1348 (8th Cir. 1993).
3. 18 U.S.C. §111 protects individuals designated in 18 U.S.C. §1114 from assault. Those designated in 18 U.S.C. §1114 for protection under 18 U.S.C. §111 include “any officer or employee of the United States or of any agency in any branch of the United States government (including any member of the uniformed services), or any person assisting such an officer or employee in the performance of such duties or on account of that assistance”
4. Specifically, 18 U.S.C. §111 reads as follows:

- a. "Whoever-- (1) *forcibly* assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in §1114 of this title while engaged in or on account of the performance of official duties; or (2) forcibly assaults or intimidates any person who formerly served as a person designated in §1114 on account of the performance of official duties during such person's term of service, shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and where such acts involve physical contact with the victim of that assault or the intent to commit another felony, be fined under this title or imprisoned not more than 8 years, or both." The statute protects federal officers from assaults, as well as deterring interference with law enforcement activities by ensuring the integrity of federal operations by punishing other forms of resistance as well. United States v. Williams, 602 F.3d 313 (5th Cir. 2010). The 9th and DC Circuits disagree (cites omitted).
 - b. "Enhanced penalty. Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both."
5. 18 U.S.C. §1114 reads as follows:

"Whoever kills or attempts to kill any officer or employee of the United States, or of any agency in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee in the performance of such duties or on account of that assistance, shall be punished . . ."
 6. Of additional interest: Title 18, U.S.C. §1115, "Influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member." This statute: (1) protects the families of public officials, judges, and law enforcement officers from retaliatory assault, kidnapping, or murder (including attempts) and (2) punishes threats to do so when the intent is to impede, intimidate or interfere with the Federal official's duty.
 7. "Forcibly" means by use of force.

- a. *Actual physical contact is not necessary.* Force need not actually have been used; it is sufficient if it was imminently threatened... United States v. Walker, 835 F.2d 983 (2nd Cir. 1987).
- b. “Forcibly” as used in this section means the defendant forcibly assaulted *or* forcibly resisted *or* forcibly opposed *or* forcibly impeded *or* forcibly intimidated *or* forcibly interfered with the victim but the government need not prove that the defendant did all of those things. It is sufficient that he did any one of the acts charged. Long v. United States, 199 F.2d 717 (4th Cir. 1952). The courts are divided on whether there must be some form of common-law assault to support a charge under 18 U.S.C. §111. It appears the most logical reading is that an individual who refuses lawful commands and must be subdued by force is in violation of 18 U.S.C. §111. United States v. Gagnon, 553 F.3d 1021 (6th Cir. 2009). However, some courts have held that merely refusing an order (such as “tensing up” and standing firm when an officer attempts to handcuff) is not sufficient to support a charge under 18 U.S.C. §111. United States v. Chapman, 528 F.3d 1215 (9th Cir. 2008).
- c. Lifting of a menacing hand toward an officer, or shoving, or spitting in the officer’s face, can be prosecuted under §111... Although some use of force is required, §111 does not require that the Federal officer be placed in fear or injured.
- d. All threats of imminent physical harm and any use of physical force is sufficient to satisfy the element of assault. Many fact patterns satisfy this element, including interfering in a pursuit by federal officers, letting dogs loose to attack federal officers, and pointing an empty gun at officers. There must be proof that the alleged threat would objectively inspire fear of pain, bodily harm, or death that is likely to be inflicted immediately. United States v. Hertular, 562 F.3d 433, 441 (2nd Cir. 2009).
- e. Resistance:...

As a general rule, no person has a right to resist arrest. Even where the arrest is unlawful, the remedy is for the suspect to submit to the arrest and then file civil and/or criminal charges. Therefore, the unlawfulness of the arrest is not a defense. However, there is some case law suggesting that the use of minimal force to resist unlawful arrest does not violate the law. Realistically, the Department of Justice would not likely pursue a prosecution against an individual who used minimal resistance (like pushing or running away) to avoid an unlawful arrest. Although the statute has no criminal intent requirement, if there are circumstances in which the official status of the person assaulted or resisted negates the very existence of mens rea, there may be a different result. For example, where an officer fails to identify himself or his purpose or his identity / purpose are not obvious by the underlying facts, the officer's conduct in certain circumstances might reasonably be interpreted as unlawful use of force directed either at the defendant or his property. In a situation of this kind, it may be justified to resist. An honest mistake of fact defense could apply. United States v. Woody, 55 F.3d 1257, 1266 (7th Cir. 1995). **Thus to negate the potential defense, it is imperative that students are taught to ensure they identify themselves, when interacting with the public.**

8. Performance of Official Duties: While §111 does not set forth what constitutes "official duties" and courts construing this language agree that "there is no bright-line test to define performance of official duties." United States v. Hoy, 137 F.3d 726, 729 (2nd Cir. 1998), quoting, United States v. Hoffer, 869 F.2d 123, 125 (2nd Cir. 1989).

- a. The courts in determining if a federal agent is engaged in the performance of his official duties examine whether the agent is acting within the scope of what he is employed to do or whether he was engaging in a personal frolic of his own. Hoffer, 869 F.2d 123 (2nd Cir. 1989) at 126, quoting United States v. Heliczzer, 373 F.2d 241 (2nd Cir. 1967), see also United States v. Clemons, 32 F.3d 1504, 1507 (11th Cir. 1994); United States v. Cunningham, 509 F.2d 961 (D.C. Cir. 1975); Being engaged in the performance of official duties does not turn on whether the law being enforced is constitutional or applicable to the defendant, or whether the levy order being enforced was validly obtained. It does however turn on the whether the federal officer is acting within the scope of what he/she is employed to do. United States v. Troy, 583 F.3d 20 (1st Cir. 2009).
- b. Whether a federal officer wears a uniform, badge or other identifying credentials is not an essential component of the test, nor is location or work assignment. Defendants have faced criminal liability under § 111 when they assaulted:
 - 1) an off-duty park ranger enforcing park rules, United States v. Hohman, 825 F.2d 1363 (9th Cir. 1987);
 - a) an off-duty DEA officer getting a haircut and overhearing a robbery in progress, United States v. Reid, 517 F.2d 953 (2nd Cir. 1975);
 - b) an IRS agent repossessing a car, United States v. Steich, 759 F.2d 579 (7th Cir. 1985);
 - c) a federal judge walking to the federal courthouse on a Sunday evening to research a case, United States v. Boone, 738 F.2d 763 (6th Cir. 1984);
 - d) a federal agent detaining a state-charged suspect, United States v. Lopez, 710 F.2d 1071 (5th Cir. 1983);
 - (1) an off-duty deputy U.S. Marshal arresting a suspect after coming upon a street fracas, United States v. Hoy, 137 F.3d 726 (2nd Cir. 1998).

- (2) An immigration officer who entered a bar to investigate report of three unlawful immigrants was performance of official duties. Amaya v. United States, 247 F.2d 947 (9th Cir. 1957).
- (3) A U.S. Secret Service agent who, while en route to investigation of credit card fraud, was assaulted after she stopped to assist a person at scene of accident, since her actions were professional and appropriate, and indicia of her official capacity were evident. United States v. Kelley, 850 F.2d 212 (5th Cir. 1988).
- e) Tribal law enforcement officers acting in the performance of their duties pursuant to contract with the Department of the Interior are protected by the statute. United States v. Oakie, 12 F.3d 1436 (8th Cir. 1993). The fact that officer had not completed training required of officers who exercise Bureau's law enforcement authority does not disqualify an officer as federal officer at time of incident. United States v Roy, 408 F3d 484 (8th Cir. 2005).
- f) Each of these cases illustrates the fluidity of the term "while engaged" and refuses to define "official duties" either with a rigid time line or highly circumscribed activity. Additionally, Congress has made no attempt to circumscribe these holdings. United States v. Hoy, 137 F.3d 726, 730 (2nd Cir. 1998).

- c. An agent need not be actually engaged in the performance of his duties to come under the protection of this section. Federal employees are also protected from retaliatory assaults initiated on account of the performance of official duties. For example: A DEA Agent was a guest at a wedding reception when he was singled out and brutally attacked solely because he was a DEA Agent. United States v. Velarde, 528 F.2d 387 (9th Cir. 1975). The assailant was convicted. United States v. Hohman, 825 F.2d 1363, 1365 (9th Cir. 1987) shows how a single assault can meet both variations of this element. Ranger Miller had finished his shift at Lake Mead NRA and changed into jogging shorts when he saw a loose dog on the beach. When he told the dog's owner that this violated park rules, the owner (Hohman) punched him twice. Ranger Miller's supervisor testified that he "was required to enforce park regulations 24 hours a day." In the words of the court: "When Miller asked Hohman to comply with local regulations by removing the dog, he was 'engaged' in the performance of his duties. When Hohman struck Wilson, it was 'on account of' that performance."
- 9. Protection under §111 for those individuals who are not federal employees or officers but who are assaulted while assisting such officer or employee.
 - a. Courts have broadly interpreted the term "assisting such officer or employee" mentioned in §1114.
 - b. In United States v. Murphy, 35 F.3d 143,145 (4th Cir. 1994), the court held that a local jailor assisting the U.S. Marshal Service in the transfer of the defendant to another facility was afforded protection under §§111 and 1114. The court held that the common usage of the term "to assist" meant that the person was being used to help a federal agent, which was what happened in this case.
 - c. In United States v. Chun, 347 F.2d 717(4th Cir. 1965) the court held that a state agent on loan to the IRS and assisting federal agents is a federal officer for purposes of §111.

- d. In United States v. Matthews, 106 F.3d 1092 (2nd Cir. 1997) the court expanded the definition of “assisting” to protect a handyman employed by a private company to install wallboard in a hotel that had been seized by the federal government in a civil forfeiture proceeding. The defendant, a tenant in the hotel, pulled a knife on one of the workers who, he thought, was installing the wallboard incorrectly. The court affirmed the defendant’s conviction under §111 holding that the handyman “assisting” the Marshal’s service based on the government’s seizure of the hotel.
10. Knowledge and Intent: The Supreme Court has found that when enacting 18 U.S.C. §111 Congress intended to protect both federal officers and federal functions and insure a federal forum for the trial of offenses involving federal officers. United States v. Feola, 420 U.S. 671(1975).
- a. All that §111 requires is an intent to assault, not an intent to assault a Federal officer—even where the officer is an undercover agent and the assailant is not aware the officer is a Federal officer. United States v. Feola, 420 U.S. 671 (1975).
 - b. The assault must be willful. In other words the defendant acted voluntarily and intentionally, and not by mistake or accident.
11. Penalties. 18 U.S.C. §111 has three penalty tiers.
- a. Simple assault, i.e., an attempt or threat to do bodily harm that does not involve an actual touching or a dangerous weapon is a misdemeanor punishable by up to one year imprisonment.
 - b. “All other cases” are felonies punishable by 8 years. These offenses involve contact but were not committed with a weapon and did not result in bodily injury.

- c. 18 U.S.C. §111(b) creates an enhanced penalty when a "deadly or dangerous weapon" is used or "bodily injury" results. The penalty for this offense is 20 years. In defining a dangerous weapon, the statute specifically includes "a weapon intended to cause death or danger but which fails to do so by reason of a defective component." Almost any object which is used or attempted to be used in a way that can endanger life or inflict great bodily harm can be a dangerous weapon. United States v. Barber, 297 F. Supp. 917 (D. Del. 1969) collected the following examples: "shoes on feet" can be a dangerous weapon, Medlin v. United States, 207 F.2d 33 (D.C. Cir.1953), as well as a "wine bottle," Thornton v. United States, 268 F.2d 583 (D.C. Cir. 1959), a "rake," Eagleston v. United States, 172 F.2d 194 (9th Cir. 1949), a "chair," United States v. Johnson, 324 F.2d 264 (4th Cir. 1963), a "brick," State v. Perry, 226 N.C. 530, 39 S.E. 2d 460 (1946), or a "chair leg," Wisniewski v. State, 138 A.2d 333 (1957). Other examples include the teeth of an HIV-positive inmate, United States v. Moore, 669 F. Supp. 289 (D. Minn. 1987), a defective zip gun, United States v. Gometz, 879 F.2d 256 (7th Cir. 1989), a patrol car door kicked into the shins of an MP by a handcuffed suspect, United States v. Sherwin, 271 F.3d 1231 (10th Cir. 2001), and a walking stick, United States v. Loman, 551 F.2d 164 (7th Cir. 1977).

H. EPO#5: IDENTIFY AND APPLY THE ELEMENTS OF TITLE 18 U.S.C. § 201.

1. All citizens have a right to fair and ethical treatment by Federal employees. Additionally, federal employees and citizens must rely upon the honesty of those participating in official positions, such as judges, jurors and witnesses. The bribery statute, 18 U.S.C. §201, is designed to punish corruption in the federal system.
2. To secure a conviction for bribery under 18 U.S.C. §201(b), the government must prove:
 - a. A corrupt offer or acceptance of something of value;
 - b. That such corrupt offer or acceptance was made to or by an officer of the United States, or person at the time acting for or on behalf of the United States in an official function; and

- c. That the offer or acceptance was intended to influence the officer or person in the doing of some particular act or performance of some duty in the public official's official capacity.
- 3. Intent: "Bribery" under 18 U.S.C. §201(b) requires proof of corrupt criminal intent. It is generally agreed that it involves a bad or evil purpose or motive.
- 4. EXAMPLES:
 - a. Defendant #1 offered Army Recruiter \$450 to keep Defendant #2 out of the service. Hurley v. United States, 192 F.2d 297 (4th Cir. 1951).
 - b. Defendant gave money to a chief narcotics investigator to release him and give narcotics back. Hone Wu v. United States, 60 F.2d 189 (7th Cir. 1932).
- 5. 18 U.S.C. §201(c) deals with the lesser included offense of giving or receiving a gratuity. Proof of conduct under these subsections differs from that of bribery. United States v. Hsieh Hui Mei Chen, 754 F.2d 817 (9th Cir. 1985).
 - a. Unlike bribery, there is no requirement of a "corrupt" offer or acceptance. Students may ask an instructor to clarify this difference between bribery and illegal gratuities. This distinction in criminal intent between the two offenses generally turns on circumstantial evidence and is often obscure in particular cases; hence, the issue is often sent to the jury. First, while bribery must involve a contemplated quid pro quo nexus between the bribe and the official act, this need not be proven to establish an illegal gratuity. Second, bribery necessarily begins with a scheme to influence future official action, while gratuity can be paid illegally even after the official act was already completed entirely uninfluenced by the later payment of the gratuity.
 - b. The government must merely establish that something of value was given to a public official for or because of an official act performed or to be performed. The crime of bribery requires a quid pro quo. There is no requirement to show that specific moneys must be tied to specific acts. Favors and gifts flowing to a public official in exchange for a pattern of official actions favorable to the donor is sufficient. United States v. Ganim, 510 F.3d 134 (2nd Cir. 2007).

The quid pro quo for bribery is a payment made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. Similarly, when the government seeks to improve honest services fraud, in the form of bribery, it must prove a quid pro quo that is clear and unambiguous, leaving no uncertainty about the terms of the bargain. Private gain is not a necessary element of honest services fraud. The intent to defraud does not depend on the intent to gain, but rather on the intent to deprive. United States v. Inzunza, 580 F.3d 894 (9th Cir. 2009). Agency ethics officers can provide specific guidance regarding gratuities. Students should be advised that every agency has an office that can advise them about ethics rules including gratuities.

6. Other considerations in charging this offense:
 - a. Both the person offering the bribe and the person who accepts it are culpable for the offense.
 - b. Title 18 U.S.C. §201(b)(2) is violated even though the official who is offered a bribe is not corrupted or the object of the bribe cannot be attained.
 - c. United States v. Arroyo, 581 F.2d 649 (7th Cir. 1978). In order for the crime of bribery to be committed, it is not necessary that the public official actually have the power to perform the act that he promises in return for money. The public official must only represent that the money will be for the purpose of influencing the performance of some official act.
 - d. The term "something of value" has been broadly construed. In United States v. Gorman, 807 F.2d 1299 (6th Cir. 1986), the term included a loan and a promise of a job. The court, after finding that the defendant could not have gotten the loan from a bank and that the offered job included a substantial raise, concluded that these items had value sufficient to sustain an illegal gratuity conviction.
7. The definition of public official:

- a. "The term 'public official' means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror."
- b. Public official has been broadly construed by the courts to include persons selected to be public officials, and a number of other related persons. It is clear that state and local government employees who are administering federal programs qualify as public officials. Where the charged public official is a congressman, the official acts described by 18 U.S.C. §201(a)(3) is not limited to so-called legislative acts such as voting on or introducing piece of legislation; rather, §201 has been read sufficiently broadly to encompass all of acts normally thought to constitute congressman's legitimate use of his office; moreover, charged public official need not have authority to make final decision or take binding action on question, matter, etc., at issue; rather, § 201 covers any situation in which advice or recommendation of public official would be influential, irrespective of official's specific authority (or lack of same) to make a binding decision. United States v Jefferson, 634 F. Supp. 2d 595 (E.D. Va.1988).
- c. The term "person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed.
- d. The statute also prohibits bribes or gratuities to persons who are former public officials (presumably because of any remaining official influence they might have).
- e. The statute also prohibits bribes or gratuities to witnesses for their testimony.

- f. The reach of federal prosecution into the activities of state and local officials administering federal funds was expanded by the Supreme Court in United States v. Dixon, 465 U.S. 482 (1984) and by Congress with the passage of 18 U.S.C. §666, "Theft or bribery concerning programs receiving federal funds."

II. FEDERAL FIREARMS VIOLATIONS

A. RAPPORT AND OPENING STATEMENT

1. All law enforcement officers face the possibility of encountering firearms on the job. This course provides a basic introduction to selected federal firearms laws. There are many federal firearms laws which this course does not address. Likewise, this course does not address agency-specific officer concerns, such as the ability to carry off-duty, the ability to carry personal weapons, etc.
2. Many states and municipalities have firearms laws which are more restrictive than federal law. Federal law enforcement officers should acquaint themselves with the firearms laws applicable in their jurisdiction.
3. During this course students will learn that machine guns, sawed-off weapons, and other extremely dangerous weapons can be legally possessed if strict legal requirements are met. However, officer safety is a paramount concern. The officer should always take steps to insure his safety and the safety of others before investigating to see if a weapon is legally possessed.

INSTRUCTOR NOTE: The Supreme Court, in District of Columbia v. Heller, 554 U.S. 570 (2008) in ruling that the 2nd Amendment protects the right to keep and bear arms for the purpose of self-defense struck down a District of Columbia law that banned the possession of handguns in the home. This same right is applicable to the States as well - the framers of the Fourteenth Amendment considered the right to keep and bear arms to be fundamental. McDonald v. City of Chicago, 130 S. Ct. 3020 (U.S. 2010).

B. ENABLING PERFORMANCE OBJECTIVES (EPO)

1. EPO #6: Identify categories of individuals prohibited from possessing firearms.
2. EPO #7: Identify and apply procedures to initiate a firearms trace through the Bureau of Alcohol, Tobacco & Firearms.
3. EPO #8: Identify the weapons listed in 18 U.S.C. §922(a)(4) which require registration with the Bureau of Alcohol, Tobacco & Firearms, and those weapons prohibited on a federal facility.

C. EPO #6: IDENTIFY CATEGORIES OF INDIVIDUALS PROHIBITED FROM POSSESSING FIREARMS.

1. A firearm is any weapon that will expel a projectile by explosive. This definition includes the frame or receiver of such weapon, a silencer or muffler, or any destructive device. 18 U.S.C. §921(a)(3). The definition does not include “antique” firearms (those manufactured prior to 1899), air-powered weapons like BB and pellet guns, black powder weapons and authentic replicas of antique firearms. 18 U.S.C. §921(a)(16).
2. Title 18 U.S.C. §922(g) prohibits certain individuals from knowingly [see 18 U.S.C. §924(a)(2)] “possessing in or affecting [interstate or foreign] commerce, any firearm **or ammunition**” United States v. Cook, 603 F.3d 434 (8th Cir. 2010). Under 18 U.S.C. §922(g), it is unlawful for the following individuals to possess firearms.
 - a. **Felon.** Anyone “who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year.” This is referred to generically as a “convicted felon,” but does not include individuals convicted of:
 - 1) A Federal or State offense pertaining to antitrust violations, unfair trade practices or similar offenses relating to the regulation of business practices, or
 - 2) “Any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.” See 18 U.S.C. § 921(a)(20).
 - 3) “Any court” includes federal convictions, state convictions, and courts-martial. Foreign convictions are NOT included. Small v. United States, 554 U.S. 385 (2005). This resolves an earlier split among the circuits regarding the issue of whether “any court” included foreign courts. Thus, even a foreign conviction punishable by imprisonment for a term exceeding one year cannot serve as a predicate offense for 18 U.S.C. § 922(g)(1).

INSTRUCTORS NOTE: Being found in possession of a loaded firearm is sufficient evidence to conclude that the defendant knowingly possessed the ammunition in the firearm. United States v. Cook, 604 F.3d 434 (8th Cir. 2010). However, proof of “knowledge of a firearms presence plus control of the vehicle in which it is located” is a required for a felon to be in unlawful possession of a firearm that is found hidden in a vehicle. Mere presence of a firearm in a vehicle without more fails to establish knowing possession (without more facts indicating knowledge would be obvious or the defendant should have known). United States v. Dooley, 580 F.3d 682 (8th Cir. 2009).

- 4) **The defense of justification (necessity) applies to a felon in possession of a firearm**, but only where the felon in a 'dangerous moment' disarms someone else thereby possessing the firearm briefly and for the sole purpose to prevent injury to himself or another. United States v. Ridner, 512 F.3d 846 (6th Cir. 2008); United States v. Kilgore, 591 F.3d 890 (7th Cir. 2010).
- b. **“Fugitive from justice”**. “Any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding.” 18 U.S.C. § 921(a)(15).

- c. **An unlawful user or addict of a controlled substance.**
The government does not have to prove the defendant was actually using drugs at the moment he purchased a firearm. It is sufficient that the defendant was in possession of drugs (small amount of marijuana). All the government has to prove is the defendant was an unlawful user of drugs at the time he possessed the firearm. United States v. Johnson, 572 F.3d 449, 454 (8th Cir. 2009). The offense of possessing a firearm while being an unlawful user of, or addicted to, a controlled substance does not violate an individual's Second Amendment right to possess a firearm. United States v. Seay, 620 F.3d 919 (8th Cir. 2010). A defendant who receives a gun **in exchange for drugs** is possessing a firearm that furthers, advances, or helps the distribution of drugs in violation of 18 U.S.C. §924(c)(1)(A). United States v. Doody, 600 F.3d 752 (7th Cir. 2010). The exchange of a gun for narcotics constitutes use of a firearm "during" and in relation to a drug trafficking crime pursuant to 18 U.S.C. §924(c)(1)(A) (which invokes the minimum mandatory sentencing requirements). Smith v. United States, 508 U.S. 223 (1993); United States v. Gardner, 602 F.3d 97 (2nd Cir. 2010). The statute also requires that when a defendant uses a firearm involving a predicate offense for enhanced punishment, the firearm must be real – a toy gun does not suffice. United States v. Leon-Quinones, 588 F.3d 748 (1st Cir. 2009).
- d. An individual who has been **adjudicated a mental defective** or who has been **committed to a mental institution**
- 1) Note that individual must have been "adjudicated" mentally defective or "committed" to an institution. Voluntarily seeking treatment does not make an individual prohibited.

- 2) After the tragic events in April, 2007, at Virginia Tech [deranged student Cho kills 32 students and faculty and himself], Congress passed and the President signed into law the National Instant Criminal Background System [NICS] Improvement Amendments Act of 2007 (P.L. 110-180, Jan. 8, 2008). This law clarified (slightly) state (and federal) reporting requirements for this category and (more significantly) appropriated \$975,000,000 to states over the next 5 fiscal years to fund automated data collection and reporting systems to notify NICS of adjudicated mental defectives and those committed to a mental institution.
- e. **An illegal alien** or non-permanent resident alien, unless that alien has special permission to carry a firearm for hunting or sporting purposes or is authorized to carry a weapon as a foreign official. The right of the people to keep and bear arms referenced in the Second Amendment does not include aliens illegally in the United States. The Constitution does not prohibit Congress from making laws that distinguish between citizens and aliens, and between lawful and illegal aliens. United States v. Portillo-Munoz, 643 F.3d 437 (5th Cir. 2011)
- f. An individual who has been **dishonorably discharged** from the Armed Forces
- g. Anyone who has **renounced United States citizenship**
- h. Anyone subject to a **court order restraining him from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner under these circumstances:**
 - 1) There must have been a hearing for which the prohibited person received notice and a chance to participate;

- 2) The restraining order must : (a) find the person a credible threat to physical safety of child or intimate partner, or (b) by its terms explicitly prohibit the use, attempted use, or threatened use of physical force against intimate partner or child that would be expected to cause injury. United States v. Dubose, 598 F.3d 726 (11th Cir. 2010). A no-contact order which by its explicit terms fails to prohibit the use, attempted use, or threatened use of physical force against an intimate partner cannot support a conviction under 922 (g)(8). United States v. Sanchez, 639 F.3d 1201 (9th Cir. 2011)
- 3) Who has been **convicted of a misdemeanor crime of domestic violence**. A domestic violence offense is a crime that "is a misdemeanor under Federal or State law" and "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim." 18 U.S.C. §921(a)(33)(A). The statutory definition is not limited to circumstances where an individual acts intentionally or knowingly. It includes offenses involving reckless conduct that causes injury or offensive physical contact. United States v. Booker, 2011 U.S. App. LEXIS 8925 (1st Cir. Me. May 2, 2011).
- This provision is particularly controversial, since some law enforcement officers lost their jobs when this provision was added in 1996.
- 4) A person is not considered convicted of a disqualifying offense unless they had:
- a) right to counsel, and
 - b) in a case in which they were entitled to a jury, the opportunity to have a jury or make a knowing and intelligent waiver of the right to jury. See 18 U.S.C. §921(a)(33)(B).

- 5) In February 2009, the Supreme Court held [7-2] that the earlier domestic violence conviction ["predicate offense"] need not be for a crime that expressly contains as an element the domestic connection between assailant and victim. In 1994, Danny Hayes was convicted of misdemeanor battery in West Virginia. The woman he had beaten was his then-wife, the mother of his child and the woman with whom he lived. In 2004, officers, responding to a 911 call concerning domestic violence, went to the Hayes home. After Hayes consented to a search, the officers found a rifle. Other evidence was developed showing that Hayes had recently possessed other firearms as well. He appealed his conviction for three counts of possessing a firearm after being earlier convicted of a misdemeanor crime of domestic violence. The Supreme Court held that once the government had proven the domestic connection between Hayes and his victim in the 1994 misdemeanor battery conviction, he could be found guilty. United States v. Hayes, 555 U.S. 415 (2009). However, the misdemeanor offense for domestic violence must have an element involving the use or attempted use of physical force that is greater than mere offense touching and must be capable of causing physical pain or injury to the victim. United States v. White, 606 F. 3d 144 (4th Cir. 2010). [7th, 9th, 10th circuits agree (cites omitted); 1st, 8th, 11th circuits disagree (cites omitted)]. This statute is a reasonable regulation of firearm use and as such does not violate the Second Amendment. United States v. Booker, 2011 U.S. App. LEXIS 8925 (1st Cir. Me. May 2, 2011).
3. A person who receives a complete pardon or expungement of a felony or misdemeanor crime of domestic violence conviction is no longer considered convicted. However, if the pardon or expungement is qualified by the condition that the person may not possess firearms, then he is still prohibited from possessing firearms under federal law. See 18 U.S.C. §921(a)(20) and 18 U.S.C. § 921(a)(33)(B)(ii).
4. **INSTRUCTOR NOTE:** 18 U.S.C. §922(n) prohibits a person indicted for a crime punishable by imprisonment for more than one year from receiving, transporting or shipping a firearm.

5. Title 18 U.S.C. §926A allows a gun owner licensed in one state to carry firearms and ammunition through a second state while en route to a third state without regard to the second state's gun laws, provided that the traveler is licensed to carry a firearm in both the state of origin and the state of ultimate destination. The firearm cannot be readily accessible from the passenger compartment during the actual transportation of the firearm.

NOTE: During the break, many students enjoy inspecting and dry-firing the weapons in the Display Kit. This is an excellent way to encourage student interest in the subject. The Instructor should encourage this practice.

D. EPO #7: IDENTIFY AND APPLY PROCEDURES TO INITIATE A FIREARMS TRACE THROUGH THE BUREAU OF ALCOHOL, TOBACCO & FIREARMS

1. The primary reason to trace a firearm through the Bureau of Alcohol, Tobacco & Firearms (ATF) is to connect a firearm to a specific suspect. An ATF trace should reveal the manufacturer, the importer if the weapon is foreign made, the wholesale distributor, the weapon dealer, and the first retail purchaser from the dealer. While possible, it is unlikely that subsequent transactions (either legal or illegal) were reported to ATF. Since many weapons used in criminal activity have been stolen and repeatedly changed hands, an ATF trace may provide relatively little information. However, it may provide leads to sources of weapons. For example, an ATF trace would indicate if an individual was legally buying a large number of guns in a state where they are readily available and transporting them for sale to an area where they are not available. Example: a criminal buying many guns in Georgia and takes them to New York City to sell illegally for profit.) Likewise, an individual possessing a stolen firearm might be linked to the theft of the firearm.
2. Gun manufacturers assign serial numbers to their firearms. The numbers themselves are not unique. It is quite possible that two different models of guns would have the same serial number. Therefore, the serial number alone is not enough to run a trace. In order to successfully run a trace, the ATF must be provided with the following:
 - a. Make
 - b. Model
 - c. Serial Number
 - d. Caliber or gauge

INSTRUCTOR NOTE: ATF started an internet-based tracing system in January 2005 called e-Trace. Available to LEOs of participating agencies and departments, e-Trace has reduced the average response time to 8 business days. The new system also supports generating statistical reports (e.g., average time-to-crime for firearms in a given location) and database queries to detect patterns and trends.

E. EPO #8: IDENTIFY THE WEAPONS LISTED IN TITLE 18 U.S.C. § 922(A)(4) THAT REQUIRE REGISTRATION WITH THE BUREAU OF ALCOHOL, TOBACCO & FIREARMS AND THOSE WEAPONS PROHIBITED ON A FEDERAL FACILITY

1. Weapons requiring BATF registration. Certain weapons are not illegal per se, but must be registered with ATF for their possession to be legal. These include short-barrel shotguns, short-barrel rifles, machine guns, silencers/mufflers, and destructive devices.
 - a. A short-barrel shotgun is a shotgun having a barrel less than 18 inches in length or an overall length of less than 26 inches. 18 U.S.C. §921(a)(6).
 - b. A short-barrel rifle is a rifle having a barrel less than 16 inches in length or an overall length of less than 26 inches. 18 U.S.C. §921(a)(8).
 - c. A machinegun is defined as “any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot without manual reloading, by a single function of the trigger (i.e. fires more than one bullet with a single trigger pull). Mere possession is insufficient to support a conviction 18 U.S.C. §922(o). The government must prove beyond a reasonable doubt that the defendant knew the weapon “had the characteristics that brought it within the statutory definition of a machinegun”. United States v. Neives-Castano, 480 F.3d 597 (1st Cir. 2007).
 - d. A silencer or muffler is any device used to silence or quiet the report of a firearm. 18 U.S.C. §921(a)(24). This is not limited to high-tech pieces of equipment, but could include common items such as oil filters, potatoes, and plastic 2-liter bottles filled with industrial foam.

- e. Destructive devices include bombs, grenades, rockets (with more than 4 oz. of propellant), missiles (with explosive charge more than one-quarter ounce), mines, or similar devices. The term also includes firearms with a bore greater than .50 caliber [except conventional shotguns]. 18 U.S.C. §921(a)(4).
- 2. If an officer sees a weapon which requires registration with ATF, the officer should always exercise safety precautions first and worry about checking the registration second. If any of these weapons are encountered on the street, it is extremely likely they are illegally possessed. While such weapons might be lawfully possessed in a home or business, it is still highly likely that the owner has not complied with the strict ATF requirements for possessing such weapons.
- 3. 26 U.S.C. §5861. This statute prohibits possession of such unregistered weapons. That statute also prohibits transferring, receiving and making such a weapon. 26 U.S.C. §5871 notes that such crimes are punishable by 10 years of imprisonment, and 26 U.S.C. §5872 dictates forfeiture of such weapons and either their destruction, retention for federal purposes or resale to state or local governments.
- 4. Weapons prohibited in a federal facility. A "Federal facility" is "a building or part thereof owned or leased by the Federal Government, where Federal employees are regularly present for the purpose of performing their official duties." 18 U.S.C. §930(g)(1).
- 5. It is unlawful to knowingly bring a "dangerous weapon" onto a "Federal facility". Dangerous weapons include: any "weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 1/2 inches in length." 18 U.S.C. §930(g)(2). This is a very wide range of weapons. Law enforcement officers working on Federal facilities should understand that nearly any item which is used as a weapon or personal self-defense device is prohibited.

6. State, local and Federal law enforcement officers are exempt from this law while in the performance of their duties. However, many Federal facilities still require law enforcement officers to check their weapons. Law enforcement officers have no absolute right to carry their weapons on Federal facilities, and if required, must check their weapons.

III. ENTRAPMENT/FALSE STATEMENTS

A. RAPPORT AND OPENING STATEMENT

1. The goal of a criminal investigator is a successful prosecution. The entrapment defense precludes the conviction of an individual if it was the government who caused him to commit the crime.
2. The Federal defense of entrapment poses two questions: (1) did the government induce the accused to commit the offense; (2) if so was the accused ready and willing without persuasion to commit the offense. On the first question the accused has the burden; on the second the government has it. The defendant is entitled to a jury instruction on entrapment if there is sufficient evidence from which a reasonable jury could find entrapment. Mathews v. United States, 485 U.S. 58 (1988).
3. While performing their duties, Federal officers frequently encounter individuals who give them false information. An individual making such a false statement is usually violating 18 U.S.C. §1001. This statute can be an effective tool to punish the makers of material false statements.

B. ENABLING PERFORMANCE OBJECTIVES (EPO)

1. EPO #9: Identify when inducements by the government are permitted or prohibited.
2. EPO #10: Identify when predisposition negates an apparent entrapment defense.
3. EPO #11: Identify and apply the elements of Title 18 U.S.C. §1001.

C. EPO #9: IDENTIFY WHEN INDUCEMENTS BY THE GOVERNMENT ARE PERMITTED OR PROHIBITED.

1. What is meant by "Entrapment"?

- a. Entrapment is the act of government officers or their agents (e.g., informants) inducing a person to commit a crime not contemplated by that person, for the purpose of prosecuting that individual. An entrapment instruction will apply when the government conduct is such that a reasonable jury could find that it "creates a substantial risk that an un-disposed person or otherwise law-abiding citizen would commit the offense. United States v. Vincent, 611 F.3d 1246 (10th Cir. 2010); United States v. Orr, 622 F.3d. 864 (7th Cir. 2010).....
- b. It is the conception and planning of an offense by officers or their agents and their procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer/agent. United States v. Russell, 411 U.S. 423 (1973).
- c. Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit the criminal act, and then induce commission of the crime so that the government may prosecute. Sorrells v. United States, 287 U.S. 435 (1932).
- d. Sentencing entrapment occurs when a defendant who lacks a predisposition to engage in more serious crime nevertheless does so "as a result of 'unrelenting government persistence.'" United States v. Veazey, 491 F.3d 700, 710 (7th Cir. 2007), quoting, United States v. Hale, 448 F.3d 971, 989 (7th Cir. 2006), cert. denied, 549 U.S. 1158 (2007). To overcome this argument, the government need not explain or defend its motives, but must show only that the defendant was in fact predisposed to violate the law without "extraordinary inducements." United States v. White, 519 F.3d 342, 347 (7th Cir. 2008).

2. The Entrapment Defense

- a. Entrapment is an "affirmative" defense. The defendant is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment. The question of entrapment is one for the jury, rather than for the judge. The Supreme Court has held that even if the defendant denies one or more elements of the charge he is still entitled to the entrapment instruction if there is sufficient evidence from which a reasonable jury could find entrapment. Mathews v. United States, 485 U.S. 58 (1988).

- b. Thus, a defendant can raise entrapment even if this is inconsistent with his other defenses. Mathews v. United States, 485 U.S. 58 (1988).
- c. Views of Entrapment
 - d. Objective view: the emphasis is on police conduct rather than the defendant's state of mind.
 - e. Subjective view: the critical factor in the entrapment equation is the state of mind of the defendant. At issue is the defendant's predisposition to commit the offense charged. The question is whether the defendant, before contact with law enforcement officers or their agents, already possessed the state of mind to commit the offense charged. Where there is no evidence to indicate the defendant was not predisposed, courts will not grant an instruction on entrapment. United States v. Hall, 608 F.3d 340 (7th Cir. 2010). However, once the defendant has raised the entrapment defense, the prosecution must negate it by establishing predisposition beyond a reasonable doubt. United States v. Navarro, 737 F.2d 625, 635 (7th Cir. 1984), cert. denied, 469 U.S. 1020 (1984). If defendant's predisposition is established, she would not be entrapped. Sorrells v. United States, 287 U.S. 435 (1932). The court in Sorrells barely upheld the subjective view. Twenty-six years later the Supreme Court upheld the subjective view and criticized the objective view as being unduly restrictive upon the prosecution. Sherman v. United States, 356 U.S. 369 (1958). The Supreme Court established the subjective view as the correct one to be used in all Federal Courts. Hampton v. United States, 425 U.S. 484 (1976). Note that Sorrells and Sherman, were 5-4 decisions and Hampton was a 5-3 decision.
- 3. Due Process Argument (Objective Entrapment)

- a. Some lower courts have observed that government conduct can be so outrageous that due process principles would absolutely bar the Government from obtaining a conviction. United States v. Twigg, 588 F.2d 373 (3rd Cir. 1978); United States v. Cuervelo, 949 F.2d 559 (2nd Cir. 1991) (sex with defendant can rise to outrageous government conduct); United States v. Russell, 459 F.2d 671 (9th Cir. 1972) (government supplies precursor drug not available to the public). For a defendant to establish outrageous government conduct sufficient to support dismissal of an indictment, there must be government over-involvement combined with a passive role by the defendant. United States v. Carriles, 541 F.3d 344 (5th Cir. 2008). In United States v. Chisum, 312 F.Supp. 1307 (C.D.Cal. 1970), the indictment was dismissed when the defendant was supplied counterfeit currency by a government agent and then indicted for receiving counterfeit currency with the intent to pass as genuine.
 - b. For example, threatening to injure the children of a target unless he committed a crime would cross this line and violate the Due Process Clause. Even if the target were predisposed to commit the crime, the Government's behavior would render the case non-prosecutable. If a prosecutor were foolish enough to proceed, the behavior would almost certainly lead to acquittal and a grave loss of public confidence in federal law enforcement. Obviously, such outrageous tactics are neither planned nor executed by professional federal law enforcement officers. But inadequately-controlled informants and other agents of the government can generate the grounds for this defense if their methods to develop cases become outrageously overzealous.
4. Inducement
- a. In general:
 - 1) There is a split of authority among the Circuits as to the amount of pressure that must be exerted by the government to form the basis for a properly supported entrapment instruction.

- 2) Without some evidence of pressure exerted by the government, no instruction on the defense need be given. A defendant is entitled to an instruction on the defense of entrapment, only when the government conduct would allow a reasonable jury to find that it "creates a substantial risk that an un-disposed person or otherwise law-abiding citizen would commit the offense. United States v. Vincent, 611 F.3d 1246, 1251 (10th Cir. 2010).
- b. The Second Circuit defines inducement as "soliciting, proposing, initiating, preaching, or suggesting the commission of the offense charged. United States v. Dunn, 779 F.2d 157, 158 (2nd Cir. 1985) quoting United States v. Sherman, 200 F.2d 880, 883 (2nd Cir. 1952) (L.Hand, J). Inducement refers to "the government's initiation of the crime and not to the degree of pressure exerted." United States v. Riley, 363 F.2d 955, 958 (2nd Cir. 1966).
- c. In the Eleventh Circuit, a defendant must demonstrate not merely inducement or suggestion but an element of persuasion or mild coercion. United States v. Andrews, 765 F.2d 1491, 1499 (11th Cir. 1985).
- d. If there is sufficient evidence of inducement to warrant an instruction, then the government must establish that the defendant was predisposed to commit the offense charged beyond a reasonable doubt. The sole issue would be whether the government carried its burden of proving the defendant was predisposed to violate the law before the government intervened. Jacobson v. United States, 503 U.S. 540 (1992).
- e. Inducement by law enforcement officers may take many forms including persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based upon need, sympathy or friendship. Inducement may take different forms, including pressure, assurances that a person is not doing anything wrong, persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy, or friendship. Inducement, however, must consist of something more than an opportunity to break the law. It is well settled that the government may use artifice, stratagem, and undercover agents in its pursuit of criminals. United States v. Myers, 575 F.3d 801 (8th Cir. 2009).

5. Permitted Inducements. Some inducements are unlikely to tempt a law-abiding person to commit a crime. Such inducements are so mild that courts generally condone their use. Some examples:
 - a. Use of deception: United States v. Engler, 806 F.2d 425 (3rd Cir. 1986).
 - b. Use of decoys (e.g., metal deer) to catch poachers.
 - c. Payment of reasonable amount of money. Note that in the ABSCAM cases a \$50,000 bribe was held to be reasonable as was a proposed \$70,000 profit for Senator Williams.
 - d. Assistance in facilitating the commission of the crime by providing equipment or supplies (e.g., paper for counterfeiting) or products (e.g., chemical for drug manufacture).
6. "Prohibited" inducements. Some inducements are so coercive that their use jeopardizes any chance of successful prosecution. These may create at least the appearance-- and sometimes the reality-- of outright duress. Threats against the well-being of the target's family in order to convince the target to agree to the proposed commission of a crime are one example. Other examples include:
 - a. Extreme appeals to the sympathy or emotions of the person solicited. The Sherman case, taken to extremes, suggests an example.
 - b. Offers of substantial, unreasonable amounts of money to an impoverished or financially desperate target. United States v. Dion, 762 F.2d 674 (8th Cir. 1985).
 - c. Continual pressure on the target, such as repeated phone calls, visits, requests, etc.
 - d. Repeated insistence, badgering or soliciting. Jacobson v. United States, 503 U.S. 540 (1992).
 - e. Violent demonstrations, threats, and animal cruelty. United States v. Skarie, 971 F.2d 317 (9th Cir. 1992) (impaling a live chicken).
7. Inducements by middlemen and informants:

- a. The extent of direction and supervision provided by Private Inducement: Entrapment occurs only when the criminal conduct was the product of the activity of law enforcement officials. This means that entrapment cannot result from the inducements of a private citizen but must be the product of conduct by governmental agents.
- b. Inducements offered by Government Informers: On the other hand, when non-Government persons are recruited and then targeted against suspects by LEO, their activities will amount to Government inducement. In some cases, the private party is clearly an "agent" of the Government. Sometimes, however, the relationship between LEO and private parties is hazy. Whether the private party's activities constitute government inducement in such cases will depend on factors like:
 - 1) LEO to the private party's actions.
 - 2) The degree to which targets are pre-selected by LEO.
 - 3) The history of similar prior operations by the private party and LEO.
 - 4) The extent to which operational resources are made available to the private party by LEO.
 - 5) The degree to which a successful operation results in some tangible reward to the private party from LEO.

D. EPO #10: IDENTIFY WHEN PREDISPOSITION NEGATES AN APPARENT ENTRAPMENT DEFENSE.

- 1. Predisposition in general:
 - a. Where a person already has a readiness and willingness to break the law, the mere fact that government agents provide what appears to be a favorable opportunity is not entrapment.
 - b. By predisposed, it is not meant that the defendant on his own, under some conceivable set of circumstances, might commit the crime, but that he is presently ready and willing to commit the crime. Predisposition is a state of mind that readily responds to the opportunity furnished by the officer or his agent to commit the forbidden act for which the accused is charged.

- c. If there is evidence of inducement considered sufficient to warrant an instruction, then the government must establish that the defendant was predisposed to commit the offense charged beyond a reasonable doubt. The sole issue would be whether the government carried its burden of proving the defendant was predisposed to violate the law before the government intervened. Jacobson v. United States, 503 U.S. 540 (1992).
- d. Use of other crimes evidence. Generally, evidence of earlier crimes or wrongdoing by the defendant is inadmissible in his criminal trial. Rule 404(a) F.R.E..
 - 1) But Rule 404(b) allows the use of evidence of "other crimes or acts" to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Courts have stated that the government may use such evidence to show predisposition.
- e. Use of Prior Convictions / Prior Arrests / Prior Criminal Activity:
 - 1) The courts have permitted the use of prior criminal activity in order to prove the predisposition of the defendant to commit the charged offense.
 - 2) Proof of prior illegal conduct is relevant to the issue of a defendant's predisposition to commit a crime. The issue is whether the defendant's involvement in a prior criminal act is sufficiently similar to the act charged in the indictment. If this requirement has been satisfied, then past acts leading up to the criminal activity are admissible to show knowledge, motive, and intent on the part of the defendant to participate in the crime charged.
- f. Use of Post-Crime Criminal Activity:

- 1) Predisposition rests on a defendant's mental state prior to commission of the crime. But that mental state can be shown by what the defendant did or said either before or after commission of the crime charged. Thus, evidence of continued drug dealing by a defendant after his indictment for earlier drug deals was admissible to prove his predisposition once he contended that he had been entrapped. United States v. Moschiano, 695 F.2d 236, 243-244. (7th Cir. 1982).
 - 2) A statement made by the defendant to an undercover agent that he would be willing to get more drugs for the agent ("if you need more I'll be here") was admissible to show his predisposition. United States v. Jenkins, 480 F.2d 1198, 1200 (5th Cir.), cert. denied, 414 U.S. 913 (1973).
 - 3) "The primary thrust of these authorities is that evidence of a similar offense, committed in close proximity of time, may be corroborative of a prior or subsequent offense. Although evidence introduced in a criminal trial generally should relate only to the specific offense charged, prior or subsequent incidents may be introduced to establish that a defendant possessed the requisite knowledge or that there is a consistent pattern, scheme of operations, or similarity of method." United States v. Rodriguez, 474 F.2d 587, 590 (5th Cir. 1973).
 - 4) "The question in each case is not whether the events at issue occurred before, during or after commission of the alleged offense. . . The question is whether the events are relevant to and probative of the defendant's willingness to commit the crime charged when first solicited to do so by a government agent." United States v. Brown, 567 F.2d 119,120 (D.C. Cir. 1977).
- g. Use of Statements to establish predisposition:
- 1) Conversations with the defendant can be very important during an undercover investigation in proving his predisposition. Whenever possible, encourage the defendant to talk or brag about his criminal enterprise.

- 2) In United States v. Hill, 626 F.2d 1301, 1302 (5th Cir. 1980), Hill boasted to the undercover agent “of his long-time involvement in procuring and selling stolen vehicles, of the quality of his wares, and the reliability of his operation, and of his past success in avoiding prosecution.”

h. Defendant’s ready acceptance:

- 1) Courts have placed heavy emphasis on the defendant’s ready acceptance of the offered inducement. In United States v. Reynoso-Ulloa, 548 F.2d 1329, 1336 (9th Cir. 1977) the court said “...while none of the factors alone indicates either the presence or absence of predisposition, the most important factor...is whether the defendant evidenced reluctance to engage in criminal activity which was overcome by repeated Government inducement.”
- 2) In other cases, the defendant’s predisposition was proven by:
 - a) an “unbridled enthusiasm for his “new career”. United States v. Anderton, 679 F.2d 1199, 1201 (5th Cir. 1982).
 - b) “I’m no Boy Scout.” United States v. Myers, 692 F.2d 823, 836 (2nd Cir. 1982) (one of the Abscam cases).
- 3) A “ready response” reveals that the defendant was a willing participant and not one that had merely succumbed to the seduction of the LEO’s inducement.

E. EPO #11: IDENTIFY AND APPLY THE ELEMENTS OF TITLE 18 U.S.C. §1001 (FALSE STATEMENTS).

1. The Statute. Title 18 U.S.C. §1001 provides as follows:
 - a. Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
 - 1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
 - 2) makes any materially false, fictitious, or fraudulent statement or representation; or

- 3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
 - 4) shall be fined under this title or imprisoned not more than five years or, if the offense involves international or domestic terrorism, fined or imprisoned 8 years, or both.
 - b. Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.
 - c. With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to...
 - 1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or
 - 2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.
2. Elements of Title 18 U.S.C. §1001. The following elements must be proven in order to establish that a violation of §1001 has occurred:
- a. Whoever ...
 - b. Regarding certain Federal matters...
 - c. Knowingly and willfully...
 - d. Makes a false material statement, or makes or uses a false writing or document **knowing it to contain a material false statement, or conceals or covers up a material fact...**
 - e. *shall be fined/imprisoned up to five years.*

In other words, to sustain a conviction the government must prove (1) that a statement was made; (2) that it was false; (3) that it was material; (4) that it was made with specific intent; and (5) that it was within the jurisdiction of an agency of the United States. United States v. Boffil-Rivera, 607 F.3d 736, 740 (11th Cir. 2010).

3. "Regarding Certain Federal Matters." False statements (oral or written), whether or not legally required to be made, which are made in a matter within the jurisdiction of the executive, legislative, or judicial branches of the United States are violations of §1001. United States v. Arcadipane, 41 F.3d 1, 7 (1st Cir. 1994). Courts have also upheld convictions under this section where individuals have made false statements to state agencies that are recipients of Federal funds.
- a. The False Statements Accountability Act of 1996. Title 18 U.S.C. §1001 applies to all three branches of the Federal government. In Hubbard v. United States, 514 U.S. 695 (1995), the Supreme Court had held that a Federal court was neither a "department," nor an "agency," within the meaning of § 1001. The Court also noted that these terms applied to Executive Branch agencies alone, as was originally intended. However, the 1996 Act overruled the Court's interpretation in Hubbard, with the following limitations:
- 1) That section (a) of the Act does not apply to a party or their counsel during a judicial proceeding for any statements, representations, writings or documents submitted by them to a judge or magistrate in that proceeding. Thus, non-parties could still be prosecuted for false statements made during a judicial proceeding, as could a party for false submissions made during administrative housekeeping matters, such as submissions to the Office of Probation, bar membership admissions or other judicial entities (the Clerk of the Court, for example).
 - 2) That section (a) of the Act shall apply to matters within the jurisdiction of the legislative branch only if they relate to administrative matters or congressional investigations conducted consistent with applicable congressional rules.
- b. Administrative matters would include such things as financial disclosure filings, claims to the House Finance Office, and submissions to other legislative entities, such as the General Accounting Office, the Government Printing Office, the Library of Congress, the Office of the Inspector General of the House and the Capitol Police.

- c. Duly authorized investigations or reviews are those activities initiated through a formal action of a House or Senate committee, or the whole House or Senate. Inquiries by members of Congress or their staff would not be a duly authorized investigation under §1001.
- d. Examples. The following examples are provided for illustrative purposes.
 - 1) United States v. Sheets, 65 F.3d 752 (8th Cir. 1995). Following an on-the-job dispute with fellow employee Quinn Hancock, Sheets filed a false amended tax return in Hancock's name. The amended return reported \$390,000 in unreported gambling revenue, which subjected Hancock to an additional tax liability of \$103,697.90. After Hancock eventually convinced the IRS that the claim was bogus, the IRS focused on Sheets. Sheets denied filing the amended tax return, furnished a disguised handwriting sample, and altered the typewriter he used to type the return before turning it over to the police. Sheets pled guilty to a two-count indictment for his false statements to the IRS.

- 2) United States v. Haggard, 41 F.3d 1320 (9th Cir. 1994). Several years after an 8-year-old girl was abducted near her home in Hayward, California, Haggard contacted the FBI and claimed to know of the location of her body and the identity of her assailant. Haggard was serving time in Indiana for burglary. During several interviews with the FBI, Haggard recounted his story, and the FBI declined to pursue the case. Upset, Haggard wrote to the San Francisco Chronicle, claiming to know the location of her body, her assailant's identity, and wanting to put the child's parents at ease and allow them to give the child a proper burial. The FBI called his bluff, and brought him to testify before a grand jury. The next day, Haggard led the FBI on a 4-hour, 100-mile wild goose chase around the Bay area. At the end of the trip, Haggard admitted he made the whole thing up, purportedly to seek favorable treatment with the Indiana Parole Board. As expected, when his hoax was revealed, the impact on the family of the missing girl was traumatic. After being indicted on 11 Federal counts, Haggard pleaded guilty to obstructing an FBI investigation, two counts of false statements to the FBI, obstructing justice by giving false testimony to a grand jury, and two counts of false statements to a grand jury. He received 78 months imprisonment, and a nominal fine and restitution.
- 3) United States v. Massey, 550 F.2d 300 (5th Cir. 1977). The defendant called the FBI on the telephone and later met with an agent. Massey told the agent that he knew of a plot to kill President Ford and Senator Ted Kennedy. The information was unsworn, oral and unrecorded. The FBI commenced an investigation and later discovered that Massey had lied. He was convicted of violating §1001.

- 4) United States v. Lambert, 501 F.2d 943 (5th Cir. 1974)(en banc), abrogated by United States v. Rodriguez-Rios, 14 F.3d 1040 (5th Cir. 1994)(en banc) as to "exculpatory no" doctrine. Lambert visited the Tampa FBI office and signed a written statement falsely stating that two Tampa Police Officers had arrested him without probable cause and had physically abused him. The FBI conducted an investigation and discovered the charge was an attempt to get back at the officers for his arrest. He was convicted of violating §1001.
- 5) United States v. Adler, 380 F.2d 917 (2nd Cir. 1967), cert. denied, 389 U.S. 1006 (1967). The defendant, a contractor at a Navy submarine base, voluntarily visited the FBI and orally stated that government officials were bribing him. The FBI commenced an investigation and later discovered, and Adler admitted, that he had falsely incriminated the government officials because the officials were too tough on him. He was convicted of violating §1001.

United States v. Herring, 916 F.2d 1543 (11th Cir. 1990). The defendant falsely applied for and received unemployment benefits from Georgia. He claimed the federal government lacked jurisdiction to prosecute under § 1001. Georgia received federal dollars to help pay the administrative costs of its unemployment program and the program was overseen by the U.S. Secretary of Labor. Therefore, jurisdiction was appropriate and the defendant's conviction upheld.

TEACHING POINT

False Statements / Jurisdiction. To determine jurisdiction, courts typically engage in two related but distinct inquiries. Does the federal government have authority as it relates to the false statement? Second, does the subject matter of the false statement relate to or implicate a federal interest? In cases involving clear use of federal funds and false statements made directly to the federal government regarding those funds, establishing jurisdiction is easy. However, where the nexus to federal funds is more attenuated (federal funds are provided to states and the disbursement of funds is several steps removed from the federal government and the false statements are also several steps removed from the actual state agency administering the federal funds because they are passed through private contractors and sub-contractors, who are ultimate recipients of federal funds) there is a real question as to whether or not the federal government has jurisdiction over the offense. How far can the federal government stretch the rubber band to obtain jurisdiction when funds and statements are passed from agency to agency and from contractor to sub-contractor. These are the current jurisdictional issues confronting the circuits and their decisions are beginning to vary. See United States v. Rodgers, 466 U.S. 475 (1984); United States v. Blankenship, 382 F.3d 1110 (11th Cir. 2004); United States v. Ford, 639 F.3d 718 (6th Cir. 2011).

- e. Statements Regarding Criminal Acts. False statements made to a Federal agency by a "witness/informant" about alleged criminal acts are within the jurisdiction of the agency.
- f. United States v. Shanks, 608 F.2d 73 (2nd Cir. 1979), cert. denied, 444 U.S. 1048 (1980). An employee (the eventual defendant) made deliberate false statements to investigators that briefly focused Secret Service attention on an innocent employee.

- g. Sica v. United States, 325 F.2d 831 (9th Cir. 1963), cert. denied, 376 U.S. 952 (1964). The IRS was investigating the tax liability of Cohen, who was involved in the cigarette vending machine business in the Los Angeles area. There was stiff competition between the vending machine companies. The IRS was able to prove that Cohen gave Sica \$5,000 in cash for his services in locating sites for the vending machines. The IRS interviewed Sica and informed him it was investigating Cohen. Sica denied in writing that he had ever accepted money from Cohen. Sica was later convicted of violating § 1001. Also, note the similarity between this violation by a witness and a violation of Title 18 U.S.C. §4 (Misprision of Felony). The defendant gave a written false statement to the FBI intended to conceal her husband's participation in a bank robbery. United States v. Pittman, 527 F.2d 444 (4th Cir. 1975), cert. denied, 424 U.S. 923 (1976).
4. Statements Regarding Regulatory Functions. False statements made to an agency regarding the regulatory functions of a Federal department or agency.
- a. United States v. Seay, 718 F.2d 1279 (4th Cir. 1983), cert. denied, 467 U.S. 1226 (1984). The defendant's husband died in 1950 while on active duty with the U.S. Army. She received benefits from the FECA (Federal Employees Compensation Act) for herself and four children. The defendant received forms stating that she would receive compensation as a widower until she died or remarried. In 1962, she moved in with Mr. Coke Seay and they lived together for 19 years. During that time, she changed her church membership and they both joined the same church as Mr. and Mrs. Coke Seay. They appeared in the church pictorial directory as "Mr. and Mrs. Coke Seay." The minister later testified at trial that the church members considered them to be married. Each year the Department of Labor sent the defendant a form, which she signed and failed to mention she was married. When the defendant discovered she was being investigated for making false statements, she moved out of Coke Seay's house and rejoined her old church. At trial the government was able to prove, that they were married under the common law and therefore she had lied on the forms sent to her by a Federal agency. She was convicted of violating §1001.

- b. United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991). Poindexter was convicted on five felony counts based on the part he played as National Security Advisor in the "Iran/Contra" affair. During his one year in that position, Poindexter made assurances that national policy was in accordance with the House Resolution concerning National Security Council assistance to the Contras, while the opposite was true. He also arranged for Oliver North to testify to those assurances and destroyed a Presidential "finding" that authorized the exchange of missiles to Iran in return for the release of hostages. He also falsely testified before the House Intelligence Committee concerning his knowledge of the missile shipments from Israel to Iran. The convictions were eventually overturned based on the immunity issues arising from his and Oliver North's testimony before the Congress United States v. North, 910 F.2d 843 (North I), **modified**, 920 F.2d 940 (D.C. Cir. 1990)(North II), cert. denied, 500 U.S. 941 (1991).
5. Knowingly and Willfully – Intent. To be a violation under § 1001, the statement must be one that is capable of affecting the exercise of a governmental function. The intent must be to deceive or to mislead and done knowingly and willfully. It is not required that the intent be to defraud. Examples include:
- a. False certifications to GSA for nonconforming plastic bags. Company president ordered employees to short GSA, but did not personally sign certification statements. United States v. Fairchild, 990 F.2d 1139 (9th Cir.), cert. denied, 510 U.S. 898 (1993).
 - b. False statements and documents sent to the IRS concerning a fraudulent land transaction were not spontaneous, emotional disclaimers, but were calculated and deliberately intended to influence the IRS; and if Duerr had not provided the information concerning the land transactions, the IRS would not have pursued the issue. United States v. Steele, 933 F.2d 1313 (6th Cir.), cert. denied, 502 U.S. 909 (1991).
 - c. Accountant produced and gave to IRS auditor a charitable deduction he stated he had failed to file in previous tax year. Deduction was later proved false. United States v. Fern, 696 F.2d 1269 (11th Cir. 1983).

- d. A defendant who deliberately avoids reading a form he is signing cannot avoid criminal prosecution for false statements contained on the form. By signing the form and not reading it the defendant acted with "reckless disregard of the truth," which has been held to satisfy the requirement of §1001. United States v. Puente, 982 F.2d 156 (5th Cir. 1993).
 - e. Leaving a blank entry on a document is equivalent to an answer "none" or a statement that there are no facts required to be reported. If there are facts that should be reported, leaving a blank belies the certification that the information therein is "true and correct." Silence may be falsity when it misleads, particularly if there is a duty to speak. United States v. Mattox, 689 F.2d 531 (5th Cir. 1982)
6. Makes a False Material Statement or Conceals or Covers up a Material Fact. The false statement made by the defendant must be "material." The materiality of a statement is a mixed question of law and fact, and is one that should be decided by the jury. As described by the Supreme Court:
- "[T]he statement must have a natural tendency to *influence, or be capable of influencing, the decision of the decision-making body to which it was addressed*. The Constitution gives the criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged. The trial judge's refusal to allow the jury to pass on the 'materiality' of Gaudin's false statements infringed that right." United States v. Gaudin, 515 U.S. 506 (1995). The test of materiality is whether the false statement has a natural tendency to influence agency action or is capable of influencing agency action. United States v. Garcia-Ochoa, 607 F.3d 371 (4th Cir. 2010) (misrepresentations on an immigration form).
- a. Oath or Affirmation. Under §1001, a false statement is not required to be under oath or affirmation. See United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991).
 - b. Form of the Statement. The false statement can be oral or written.

- 1) United States v. Moore, 27 F.3d 969 (4th Cir. 1994). Federal agents were investigating bank fraud by Moore and others. Moore was being interviewed by an FBI agent, a postal inspector, and two Assistant U.S. Attorneys where he denied his part in the preparation of false tax returns used by his client to obtain bank loans. Moore not only denied preparing the documents, but went on to say that he had not prepared any tax forms for the client, denied the handwriting on the form was his, but admitted the handwriting was similar to his. Moore then stated that he had never used the type of form that was being questioned.
- 2) United States v. Barr, 963 F.2d 641 (3rd Cir. 1992). Barr served as an Assistant to the Attorney General in Washington, D.C. for nine months. On Barr's SF-171 and SF-86, he answered "no" to questions concerning the use or possession of marijuana, narcotics, hallucinogenic, or other dangerous or illegal drugs. He was interviewed by the FBI as part of the security clearance procedure. After Barr resigned from his position, it was learned that Barr had used cocaine several times during the time period he had answered "no" to use of drugs in the SF-171, SF-86, and the FBI interview. He had also used cocaine while employed with the Attorney General. Barr was convicted of false statements and drug possession.
- 3) United States v. Berisha, 925 F.2d 791 (5th Cir. 1991). Berisha was preparing to board an international flight from Dallas - Ft. Worth when a customs inspector approached him and asked him if he was carrying more than \$10,000. Berisha twice stated he only had \$8,000 with him. The inspector later observed Berisha attempt to pass a roll of currency to a companion. The total amount of currency possessed by Berisha was over \$17,000. He was convicted of failing to report the currency and false statements.

- 4) United States v. Moore, 612 F.3d 698 (D.C. Cir. 2010). Signing a false name to a U.S. Postal Service delivery form that was being used to track a controlled delivery of cocaine by Postal Inspectors was material, as it was capable of affecting the function of tracking packages and identifying recipients of packages entrusted to the Postal Service.
- 5) The “Exculpatory No.” At one time, some circuits held that false “exculpatory no” statements made by a suspect to agents in a criminal investigation were not a violation of §1001. An “exculpatory no” statement is a statement in which the suspect merely denies that he is guilty of the crime in which he is a suspect. Even if the statement was untrue (i.e., he did in fact commit the criminal act), such a statement could not be charged under § 1001. The leading decision of the “exculpatory no” doctrine originated from the Fifth Circuit in Paterno v. United States, 311 F.2d 298 (5th Cir. 1962), abrogated by United States v. Rodriguez-Rios, 14 F.3d 1040 (5th Cir. 1994)(en banc). Nevertheless, the United States Supreme Court put the “exculpatory no” issue to rest when it decided United States v. Brogan, 522 U.S. 398 (1998). In Brogan, the Court held that the plain language of § 1001 did not support any exception for an “exculpatory no” statement. The Court made it clear that, “[b]y its terms, §1001 covers ‘any’ false statement...of whatever kind...including the use of the word ‘no’ in response to a question.” Justice Scalia emphasized that “...the Fifth Amendment does not confer a privilege to lie,” language that had been used by the Fifth Circuit in Rodriguez-Rios.
 - c. False “exculpatory no” statements made regarding an administrative or regulatory investigation never fell within the exception to §1001. False statements made to Federal investigators that relate to Federal regulatory functions of a department or agency can form the basis for Federal prosecution under § 1001. See United States v. Barr, 963 F.2d 641 (3rd Cir. 1992)(false entries on SF-171 and SF-86 for employment), and United States v. Berisha, 925 F.2d 791 (5th Cir. 1991)(false entry on Customs currency reporting form).

- d. Congress addressed the “false exculpatory no” doctrine in the False Statements Accountability Act of 1996, by implicitly applying the doctrine in judicial proceedings where statements and other submissions to the court are made by the defendant or defendant’s counsel. The Department of Justice was concerned that adding any other proviso ending or extending the doctrine might delay the rest of the Act’s passage and invite new judicial interpretation.
- 7. Miscellaneous Statutes Related to §1001:
 - a. Title 2 U.S.C. §192 (Contempt of Congress).
 - b. Title 18 U.S.C. §4 (Misprision of Felony).
 - c. Title 18 U.S.C. §287 (False, Fictitious or Fraudulent Claims).
 - d. Title 18 U.S.C. §1002 (Possession of False Papers to Defraud the United States).
 - e. Title 18 U.S.C. §1005 (Bank Entries, Reports and Transactions).
 - f. Title 18 U.S.C. §1015 (Naturalization, Citizenship, or Alien Registry).
 - g. Title 18 U.S.C. §1505 (Obstruction of Proceedings Before Departments, Agencies, and Committees).
 - h. Title 18 U.S.C. §1621 (Perjury).
 - i. Title 18 U.S.C. §1622 (Subornation of Perjury).
 - j. Title 18 U.S.C. §1623 (False Declarations Before Grand Jury or Court).
 - k. Title 26 U.S.C. §7207 (False Statements to an IRS Agent)

IV. CONSPIRACY / PARTIES

A. RAPPORT AND OPENING STATEMENT

- 1. There are various conspiracy statutes in the United States Code (U.S.C.), but this course covers only the general criminal conspiracy statute, codified at Title 18 U.S.C. §371.
- 2. The Supreme Court has often referred to the crime of conspiracy as “a partnership in crime.” United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150 (1940). As such, each conspirator, like a business partnership, is liable for virtually all acts and admissions of any co-conspirators.

3. The crime of conspiracy was created because of the inherent dangers posed to society when two or more individuals deliberately plot to violate the law. The Supreme Court has remarked on the dangers of a criminal conspiracy:

“It involves the deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.” United States v. Rabinowich, 238 U.S. 78 (1915).
4. The general approach to conducting a conspiracy investigation is to identify the members within the organization along with their respective roles for achieving the criminal objectives. Criminals attempt to conceal their plans and avoid detection so recruiting and developing witnesses is critical to any conspiracy investigation. Investigators will need to locate and obtain evidence to corroborate witnesses and support the theory of the case that the defendants were acting together in agreement, toward a common criminal objective.
5. A person who commits a crime is called the “principal” of the offense. However, a crime may involve persons who assist the one who actually performed the criminal act. Additionally, the Federal statute pertaining to “Principals” (Title 18 U.S.C. §2) contains a subsection concerning those who “cause” a crime to be committed. Still others may be involved in assisting the principal in some manner after the crime has been committed. These individuals are referred to as “accessories after the fact.” Finally, other individuals may have knowledge of a Federal crime, and commit an act that “conceals” the true nature of the crime. These individuals may be guilty of “misprision of felony.”
6. The General Federal Conspiracy Statute. Title 18 U.S.C. §371 reads as follows:
 - a. “If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

- b. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.
- 7. The Importance of the Statute. Title 18 U.S.C. §371 is a valuable tool for criminal investigators, and can often be used to great advantage.
 - a. Pro-Active. Because the statute is pro-active in nature, criminals can be apprehended prior to any substantive criminal offense being committed (e.g., before the bank robbery attempt). United States v. Feola, 420 U.S. 671 (1975).
 - b. Peripheral Helpers. Under the conspiracy statute, persons who could not be convicted as a principal under 18 U.S.C. § 2 (because a crime was never actually consummated) may still be caught in the web of a conspiracy.
 - c. Insulated Leaders. In many criminal organizations, the leaders insulate themselves from those members whose actions are more visible, thus making them less likely to get caught. The law of conspiracy provides a method to reach beyond the visible layer and immobilize the entire organization.
 - d. Doctrine of Merger. The conspiracy to commit a crime is a separate and distinct offense from the crime being planned and does not merge with any completed crime. Pinkerton v. United States, 328 U.S. 640 (1946). Accordingly, a defendant may be convicted and sentenced both for conspiracy to commit a crime and for the substantive crime itself. Even if the same act established the facts for both offenses, it is not double jeopardy.
 - e. Inconsistent Verdicts. The law recognizes that inconsistent verdicts are often returned in criminal cases. The crime of conspiracy increases the chance that a defendant will be convicted of at least one charge. Thus, even when a defendant is acquitted of the substantive crime, he or she may still be convicted of the conspiracy charge. United States v. Hughes Aircraft Co., 20 F.3d 974 (9th Cir.), cert. denied, 513 U.S. 987 (1994). Alternatively, an individual may be convicted of the substantive offense, but acquitted of the conspiracy charge. United States v. Stevens, 909 F.2d 431 (11th Cir. 1990).

8. The Elements of Conspiracy. The crime of conspiracy under Title 18 U.S.C. §371 has five (5) elements.
 - a. Two or More Persons ...
 - b. Intentionally ...
 - c. Agree ...
 - d. To Violate Federal Law or Defraud the United States Government ... and
 - e. Commit An Overt Act In Furtherance Thereof.
9. Completion of the Conspiracy. When all of the above elements are present, the conspiracy is said to be COMPLETE. This does not mean that the conspiracy is finished, only that all the elements for a chargeable offense are now present.

B. ENABLING PERFORMANCE OBJECTIVES (EPO)

1. EPO #12: Identify how many persons are needed to form a conspiracy.
2. EPO #13: Identify when knowledge and intent are sufficient to constitute a conspiracy.
3. EPO #14: Identify an agreement and its functions according to the provisions of Title 18 U.S.C. §371.
4. EPO #15: Identify the function of an overt act in the crime of conspiracy.
5. EPO #16: Identify when a co-conspirator's statement may be used during the prosecution of a conspiracy.
6. EPO #17: Identify the limits of the withdrawer's or late joiner's criminal liability.
7. EPO #18: Identify when a person may be prosecuted for assisting another in the commission of a crime, in accordance with Title 18 U.S.C. §§2-4.

C. EPO #12: IDENTIFY HOW MANY PERSONS ARE NEEDED TO FORM A CONSPIRACY

1. Two or More Persons. The plain language of Title 18 U.S.C. §371 requires the participation of “two or more persons.” The more difficult question to be answered is not how many persons are required for the crime, but who can those persons be. When investigating a conspiracy case, it is particularly important to know who cannot be considered to be a conspirator to complete the two person requirement.
 - a. Undercover Agents. Under §371, an agreement between only two persons, one of whom is an undercover government agent, cannot support a conspiracy conviction, in that the requisite plurality is not present. United States v. Pennell, 737 F.2d 521 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985).
 - b. Confidential Informants. Informants working for the government are considered as an extension of the government, and, like undercover agents, cannot be counted as a person to satisfy the two-person requirement. An agreement between the defendant and at least one other non-government affiliated party must be proved. United States v. Delgado, 631 F.3d 685 (5th Cir. 2011).
 - c. Partnerships. Unlike corporations, a partnership may not be named in the indictment as a conspirator, even where the conspiracy was intended to benefit the partnership. Nonetheless, the individual partners may be indicted for their participation in the conspiracy.

In addition, there are several categories of individuals who may or may not be considered as one of the necessary two or more persons.
 - d. Mentally Ill Persons. Similar to undercover agents, if a mentally ill individual is not capable of forming the requisite intent to commit the crime, they may not be one of the required “two or more persons” necessary for a conspiracy conviction under § 371. United States v. Phillips, 630 F.2d 1138 (6th Cir. 1980).

- e. Minors. Minors may constitute one of the necessary “two or more persons.” However, each case must be considered based on the circumstances present in each particular case, considering the age of the minor, their intellect, their education, etc.
- f. Landlords and Tenants. A landlord does not automatically become a co-conspirator simply because he or she has knowledge that a tenant is utilizing the property for criminal activities. Instead, it must be shown that the landlord was a party to the agreement. This can be done by showing that the landlord had a stake in the outcome of the conspiracy, above and beyond collecting the normal rent for the property. If this cannot be shown, the landlord may still be guilty under Title 18 U.S.C. §2 (Principals), discussed later in this lesson plan.
- g. Buyers and Sellers as Conspirators. A merchant need not abstain from engaging in his lawful business simply because his customer is engaged in an illegal activity. United States v. Falcone, 311 U.S. 205 (1940). Knowledge of the part of the seller is not enough, standing alone, to make him or her a conspirator. The seller must also have the necessary intent to assist the criminal venture. For example, where a merchant charges more for the merchandise purchased for use in the criminal activity, the additional profits show that the seller has a stake in the outcome of the illegal venture. Direct Sales Co. v. United States, 319 U.S. 703 (1943).

Also, be aware of the following categories in determining the two or more persons requirement.
- h. Husbands and Wives. While considered a single “person” at common law, the Supreme Court has taken a different view, recognizing that a husband and wife may conspire with one another. United States v. Dege, 364 U.S. 51 (1960).
- i. Employers and Employees as Co-Conspirators. If an employee is aware that his or her work-related duties are contributing to a criminal venture on the part of his employer, the employee may be held liable as a conspirator.

- j. Attorneys. An attorney may become a co-conspirator by providing advice to conspirators, if the attorney provides the advice before or during the commission of the conspiracy; the attorney has knowledge of the conspiracy; and the attorney intends to assist the conspiracy in attaining its ultimate objective(s).
- k. Corporations. A corporation may be indicted for the crime of conspiracy in certain instances. Specifically, where there are two "real" people, one of whom is authorized to act on behalf of the corporation (e.g., a chief executive officer), and the conspiracy is formulated to benefit the corporation, both the individual conspirators and the corporation may be indicted.
- l. Consistency of Convictions
 - 1) Traditional Rule. Traditionally, the "Rule of Consistency" provided that, if co-conspirators were tried in a single trial, a sole co-conspirator could not be found guilty of conspiracy under §371, if all other co-conspirators were acquitted.
 - 2) Recent Developments. The majority of the federal Courts of Appeal no longer follow the traditional rule. Therefore, the conviction of a co-conspirator may be upheld, even if all other co-conspirators were acquitted of the conspiracy charge in the same trial.
 - 3) Multiple Trials. The "Rule of Consistency" is inapplicable in cases where co-conspirators are tried in separate trials, based on the fact that different juries may hear different evidence.

D. EPO #13: IDENTIFY WHEN KNOWLEDGE AND INTENT ARE SUFFICIENT TO CONSTITUTE A CONSPIRACY

- 1. General Concepts. In a conspiracy prosecution, the government must prove that the defendant had knowledge of the conspiracy and intended to participate in it.
- 2. Knowledge. To be a co-conspirator, an individual must know of the conspiracy's existence and its overall plan or purpose.

- a. Knowledge Regarding Co-Conspirators. While the defendant in a conspiracy case must know at least one other person involved in the conspiracy, there is no requirement that the defendant know the identity, number, or role of all co-conspirators involved in the plan. Blumenthal v. United States, 332 U.S. 539 (1947).
 - b. Knowledge Regarding Details of the Plan. Secrecy and concealment are essential features of a successful conspiracy. Accordingly, there is no requirement that the defendant know all of the details of the conspiracy. United States v. Heras, 609 F.3d 101 (2nd Cir. 2010). Even though there is no evidence to show involvement in initial planning of the crime, subsequent involvement can provide a sufficient basis to infer knowledge of a codefendant's plan and shared common purpose. U.S. v. Figueroa – Cartagena, 612 F.3d 69 (1st Cir. 2010). The presence of fraud can be so obvious and pervasive that knowledge of its character can be attributed to a defendant. United States v. Mateos, 623 F.3d 1350 (11th Cir. 2010).
 - c. Reasonably Foreseeable Acts. The reasonably foreseeable acts of one co-conspirator, committed in furtherance of the overall plan of the conspiracy, are attributable to all other co-conspirators. Pinkerton, *supra*.
3. Intent. The government must show that the defendant intended to participate in the conspiracy. In most cases, a defendant's intent must be inferred from the circumstances and proven through circumstantial evidence. In making this determination, courts will look at "the defendant's relationship with other members of the conspiracy, the length of association between the members, the defendant's attitude and conduct, and the nature of the conspiracy." United States v. Collazo, 732 F.2d 1200 (4th Cir. 1984), *cert. denied*, 469 U.S. 1105 (1985).

E. EPO #14: IDENTIFY AN AGREEMENT AND ITS FUNCTIONS ACCORDING TO THE PROVISIONS OF TITLE 18 U.S.C. §371

1. General Concepts. The essence of any conspiracy is the agreement itself. Two or more persons must agree to work together towards the accomplishment of a common goal. The government must prove the existence of an agreement in order to successfully prosecute conspirators under §371.

2. Proving the Agreement. An agreement may be proven through circumstantial evidence. The agreement does not have to be put into words, either oral or written. United States v. Armstrong, 16 F.3d 289 (8th Cir. 1994). In fact, an agreement may be inferred from all of the facts and circumstances. Hamling v. United States, 418 U.S. 87 (1974).
3. Number of Conspiracies. To determine whether more than one conspiracy exists, the crucial factor is the number of agreements. United States v. Kearney, 560 F.2d 1358 (9th Cir. 1967), cert. denied, 434 U.S. 971 (1977). One agreement results in only one conspiracy, even though the agreement encompasses several unlawful acts. In determining the number of conspiracies in existence, courts will examine the nature of the scheme; the identity of the participants; the quality, duration, and frequency of each conspirator's transactions; and the commonality of time and goals. United States v. Cambindo-Valencia, 609 F.2d 603 (2nd Cir. 1979), cert. denied, 446 U.S. 940 (1980).
4. Objects of the Agreement. In order to prosecute a defendant under § 371, either the object of the agreement or the means to accomplish the object must (1) be a crime against the United States or (2) tend to defraud the United States. The objective of the conspiracy does not have to be a crime. Hammerschmidt v. United States, 265 U.S. 182 (1924). It is sufficient to show that the contemplated objective would "impede, impair, defeat, or obstruct the proper functions of the United States Government."
 - a. Legal Objective/Illegal or Fraudulent Means. The objective of the conspiracy may be entirely legal, but the means of accomplishing it violate Federal law. For example, if the objective of the conspirators is to open their own restaurant, but they rob banks in order to obtain the funds, a conspiracy charge will lie.
 - b. Illegal or Fraudulent Objective/Legal Means. In this situation, the objective of the conspiracy is illegal (such as committing arson of a Federal building), but the means of accomplishing it are perfectly legal (such as buying matches and gasoline). Because the objective is a violation of Federal law, a conspiracy charge can be brought.

- c. Illegal or Fraudulent Objective and Means. In this situation, both the objective and the means of accomplishing it are illegal, such as when individuals steal weapons to use in a bank robbery. In such a case, a conspiracy charge would be proper.
- 5. Factual Impossibility. Even though it may be factually impossible to accomplish the objective of the conspiracy, this is not a defense to a prosecution under § 371. United States v. Recio, 537 U.S. 270 (2003); United States v. Giry, 818 F.2d 120 (1st Cir.), cert. denied, 484 U.S. 855 (1987).

F. EPO #15: IDENTIFY THE FUNCTION OF AN OVERT ACT IN THE CRIME OF CONSPIRACY

- 1. General Concepts. The final element that must be proven in any conspiracy prosecution under §371 is that, following the agreement, one of the conspirators committed an overt act in furtherance of the agreement.
- 2. Definition. An "overt act" is any act by a conspirator that tends to assist in the accomplishment of the overall plan of the conspiracy.
- 3. Purposes of the Overt Act. The overt act serves three important purposes.
 - a. Completes the Crime of Conspiracy. Once an overt act is committed by one of the conspirators, the crime of conspiracy has been completed, irrespective of whether the ultimate goal of the conspiracy is ever committed.
 - b. Withdrawal. Since the crime of conspiracy is not actually complete until there has been an overt act, the overt act provides a demonstrable point in time before which an individual may withdraw from the agreement without incurring criminal liability under §371.
 - c. Proof of Intent. The overt act demonstrates that the conspirators have moved from thinking about the crime to actually acting on their agreement. In other words, an overt act shows that the agreement is not dormant, but that it is actively being pursued by the conspirators. Yates v. United States, 354 U.S. 298 (1957); overruled on other grounds by, Burks v. United States, 437 U.S. 1 (1978)

4. Number of Overt Acts Required. Only one overt act must be committed to complete the conspiracy. A single overt act committed by one conspirator is sufficient to complete the conspiracy for all members, including those who join the conspiracy after it has begun. United States v. Kissell & Harned, 218 U.S. 601 (1910).
5. Timing of the Overt Act. The overt act must occur after the agreement has been formed. An overt act performed prior to the agreement (sometimes termed a "preparatory act") may not be used to complete the crime of conspiracy.
6. Nature of the Overt Act. The overt act need not be criminal in nature, but may, in fact, be entirely lawful. Braverman v. United States, 317 U.S. 49 (1942).

G. EPO #16: IDENTIFY WHEN A CO-CONSPIRATOR'S STATEMENT MAY BE USED DURING THE PROSECUTION OF A CONSPIRACY

1. General Concepts. Federal Rule of Evidence (Fed. R. Evid.) 801(d)(2)(E) provides, in pertinent part, that: "A statement is not hearsay if ... the statement is offered against a party and is ... a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." Bourjaily v. United States, 483 U.S. 171 (1987).
2. Applying the Rule. Under Fed. R. Evid. 801(d)(2)(E), everything said, done, or written by a conspirator during the existence of the conspiracy and in execution or furtherance of the conspiracy is admissible against all co-conspirators. When determining whether a co-conspirators statement is admissible under this rule, the following five (5) questions must be asked:
 - a. Was There a Conspiracy?
 - b. Was the Defendant a Member of the Conspiracy?
 - c. Was the Person Who Made the Statement a Member of the Conspiracy?
 - d. Was the Statement Made During the Conspiracy?
 - e. Was the Statement Made In Furtherance of the Conspiracy?

3. Analyzing the Responses. If the answer to each of the above questions is "yes," then the statement is admissible under Fed. R. Evid. 801(d)(2)(E). However, if the answer to any of the above questions is "no," then the statement is not admissible under this rule, although it may be admissible under another exception or exclusion to the hearsay rule. Bourjaily, supra. Moreover, even though the statement is admissible, a co-conspirators statement standing alone is not sufficient to prove the existence of the conspiracy or that the declarant or the defendant is a member of a conspiracy. Fed. R. Evid. 801(d)(2)(E)

H. EPO #17: IDENTIFY THE LIMITS OF THE WITHDRAWER'S OR LATE JOINER'S CRIMINAL LIABILITY

1. General Concepts. The law recognizes that someone may join or withdraw from a conspiracy after it has begun. Those who join the conspiracy after it has begun are referred to as "late joiners," while those who leave the conspiracy after it has begun are referred to as "withdrawers."
2. Late Joiners
 - a. Criminal Liability. "Late joiners" are criminally liable not only for conspiracy, but for any reasonably foreseeable crimes committed by his co-conspirators while the "late joiner" is a member of the conspiracy, to include the ultimate goal of the conspiracy if it is a criminal offense. However, "late joiners" are not criminally responsible for any acts of co-conspirators committed prior to their joining the conspiracy. Levine v. United States, 383 U.S. 265 (1966). Nonetheless, the prior acts of the co-conspirator's are admissible at the trial of the "late joiner" in order to show that there was actually a conspiracy in existence for the "late joiner" to join. United States v. G.M. Corporation, 121 F.2d 376 (7th Cir.), cert. denied, 314 U.S. 618 (1941).
 - b. A late comer may be convicted of conspiracy even if she did not learn of the crime at its inception, but knowingly assisted at a later stage. United States v. Figueroa-Cartagena, 612 F.3d 69 (1st Cir. 2010)
 - c. Effect on Conspiracy. The addition of a new conspirator does not create a new conspiracy.
 - d. No Additional Overt Act Required. The addition of a new conspirator does not require that an additional overt act be performed after the "late joiner's" addition.

3. Withdrawers. A commonly utilized defense to a conspiracy charge is withdrawal.
- a. Criminal Liability. A conspirator who withdraws from a conspiracy is liable for the crime of conspiracy, as well as any reasonably foreseeable crimes committed by his co-conspirators while he was a member of the conspiracy. Only by withdrawing from the agreement prior to the overt act can an individual entirely avoid liability for a conspiracy charge. Once a valid withdrawal occurs, however, the withdrawing conspirator will escape liability for any subsequent criminal acts of the remaining conspirators. United States v. Richardson, 939 F.2d 135 (4th Cir. 1991), cert. denied, 502 U.S. 1061 (1992).
 - b. Requirements. There are two (2) requirements that must be met for a conspirator to validly withdraw from a conspiracy.
 - 1) Affirmative Act. The first requirement the defendant must prove to establish a valid withdrawal from a conspiracy is that he or she took some affirmative act(s) inconsistent with the goals of the conspiracy. Unless the defendant produces affirmative evidence of withdrawal, his or her participation is presumed to continue. Hyde v. United States, 225 U.S. 347 (1912).
 - 2) Communication. The affirmative act of withdrawal must be communicated in a manner reasonably calculated to reach at least one other co-conspirator or law enforcement. United States v. United States Gypsum Co., 438 U.S. 422 (1978).
 - c. Mere Cessation of Activity. Withdrawal from a conspiracy requires more than simply cessation of participation in the conspiracy. United States v. Barsanti, 943 F.2d 428 (4th Cir. 1991), cert. denied, 503 U.S. 936 (1992).
 - d. Burden. The burden of proving a valid withdrawal rests with the defendant.
 - e. Effect on Conspiracy. The withdrawal of a single conspirator does not terminate the conspiracy or change the status of the remaining conspirators, unless the required "two or more persons" are no longer present (such as the withdrawal of a single conspirator from a two-person conspiracy).

I. **EPO #18: IDENTIFY WHEN A PERSON MAY BE PROSECUTED FOR ASSISTING ANOTHER IN THE COMMISSION OF A CRIME, IN ACCORDANCE WITH TITLE 18 U.S.C. §§2-4.**

1. Title 18 U.S.C. §2(a). Title 18 U.S.C. §2 is actually entitled "Principals." Pursuant to this statute, individuals who provide assistance to a principal either before or during the commission of a crime may be held criminally liable as if they themselves had committed the offense. The statute is actually broken into two (2) subsections. The first part of the statute, subsection §2(a), deals with "aiding and abetting" a crime, and reads as follows:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal."

- a. Liability of Defendant. It is important to remember that, if an individual is found guilty of being an "aider and abettor," he or she may be punished as if they had committed the crime themselves (i.e., as if they themselves were the principal of the offense).
- b. The Elements of Aiding and Abetting. There are three (3) elements necessary to prove a crime under subsection § 2(a).
 - 1) Affirmative Act of Association. The statute requires that a defendant actually do something to assist in the commission of the crime.
 - a) Definition. An "affirmative act of association" has been defined as follows: "In order to aid and abet another to commit a crime, it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, and that he seek by his action to make it succeed." United States v. Peoni, 100 F.2d 401, 402 (2nd Cir. 1938).

- b) Timing. The affirmative act of association must occur either before or during the commission of the crime by the principal. An individual who arrives on the scene after the offense has ended cannot be held liable as an aider and abettor. However, when the criminal conduct extends over a period of time, a latecomer may be convicted of aiding and abetting even if she did not learn of the crime at its inception but knowingly assisted at a later stage while the crime was still being committed. United States v. Figueroa-Cartagena, 612 F.3d 69 (1st Cir. 2010). If the act occurs after the commission of the crime, the defendant may be held liable as an “accessory after the fact,” discussed more below.
 - c) Mere Presence. The defendant is not required to be present at the time the crime is committed to be liable under §2(a). Hume v. United States, 118 F. 689 (5th Cir. 1902), cert. denied, 189 U.S. 510 (1903). Further, mere presence at the scene of the crime, even in the presence of the principal, does not, standing alone, make an individual an aider and abettor. United States v. Williams, 341 U.S. 58 (1951).
- 2) Knowledge. In addition to an affirmative act of association, the defendant must also have knowledge that he or she is assisting in the commission of a crime.
- a) Detail Required. There is no requirement that the defendant know all of the details of the crime. Williams v. United States, 308 F.2d 664 (9th Cir. 1962). However, where an individual unknowingly provides assistance to a principal, a prosecution under §2(a) will not lie.

- b) Willful Blindness. Deliberate avoidance of knowledge will not preclude a finding of knowledge. This occurs when a defendant asserts a lack of guilty knowledge, but the evidence supports an inference that he or she instead chose to intentionally avoid gaining knowledge about the circumstances surrounding their assistance in order to avoid liability. United States v. Gruenberg, 989 F.2d 971 (8th Cir. 1993).
 - 3) Commission of an Offense Against the United States. In order to prosecute an individual as a principal under 18 U.S.C. §2(a), a crime must actually be committed. United States v. Provenzano, 334 F.2d 678 (3rd Cir.), cert. denied, 379 U.S. 497 (1964).
 - a) Conviction of Principal. A defendant may be convicted under §2(a) even though the person who actually committed the crime is never convicted, caught, or even identified. United States v. Untiedt, 493 F.2d 1056 (8th Cir.), cert. denied, 419 U.S. 862 (1974).
 - b) Charging the Crime. When an individual is charged with aiding and abetting, the indictment need not specifically charge “aiding and abetting.” United States v. Armstrong, 909 F.2d 1238 (9th Cir.), cert. denied, 498 U.S. 870 (1990). Because those who aid and abet a crime are held liable as the principal of the crime, the indictment would charge the defendant with the completed offense (e.g., bank robbery).
- 2. Title 18 U.S.C. §2(b). The second subsection of the statute, §2(b), addresses those individuals who intentionally cause another person to commit an offense against the United States. This subsection reads as follows:

“Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal.”

 - a. The Elements of “Causing.” There are three (3) elements necessary to prove a crime under subsection §2(b).

- 1) An Act. The defendant must cause another to perform some act that, if directly performed by the defendant or another, would be a crime. United States v. Kelley, 395 F.2d 727 (2nd Cir.), cert. denied, 393 U.S. 963 (1968).
 - 2) Intentional. Further, the defendant must intentionally cause the other to perform the act.
 - 3) Offense Against the United States. Finally, the defendant must cause the other to perform an act that is an offense against the United States.
- b. Additional Concepts
- 1) Mere Presence. A prosecution under §2(b) does not require that the defendant be present at the time the criminal act occurs.
 - 2) Knowledge. Further, there is no requirement under § 2(b) that the defendant actually know the individual who commits the crime.
 - 3) Conviction of Other Person. Finally, there is no requirement under §2(b) that the person who actually committed the crime be convicted before the defendant can be convicted.
 - 4) Charging. As with §2(a), the defendant need not specifically be charged in the indictment with "causing" another to commit the crime, but only with the completed offense.
3. Title 18 U.S.C. §3. Title 18 U.S.C. §3 is directed at those individuals who provide assistance to the principal of a crime following the commission of the crime. The statute provides as follows:
- "Whoever, knowing that an offense against the United States committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact."

- a. Liability of Defendant. "Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or ... fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by life imprisonment or death, the accessory shall be imprisoned not more than 15 years."
- b. The Elements of Accessory After the Fact. There are three (3) elements necessary to prove a crime under §3.
 - 1) Crime Must Be Committed. First, a crime must actually be committed before a defendant can be found guilty of violating 18 U.S.C. §3. Whether the crime was a felony or misdemeanor is irrelevant.
 - 2) Knowledge. Second, the defendant must have knowledge that a crime has been committed, although he or she need not know the precise nature of the crime. United States v. Balano, 618 F.2d 624 (10th Cir. 1979), cert. denied, 449 U.S. 840 (1980).
 - 3) Assistance to the Principal. Third, the defendant must willfully assist the principal so as to prevent or hinder the apprehension, trial or punishment of the principal.
- c. Additional Concepts
 - 1) Timing of the Assistance. A violation of §3 can occur only after the crime has been committed. Government of the Virgin Islands v. Aquino, 378 F.2d 540 (3rd Cir. 1967). A defendant who provides assistance to the principal before the crime or while the crime is in progress is guilty as an aider and abettor. United States v. Barlow, 470 F.2d 1245 (D.C. Cir. 1972).
 - 2) Conviction of the Principal. As with aiding and abetting, the conviction of the principal is not required to convict the defendant of violating §3. United States v. Walker, 415 F.2d 530 (9th Cir. 1969).

- 3) Silence as Assistance. An individual's silence may not be used to prove that the individual is an accessory after the fact. However, where an individual provides false or misleading statements to law enforcement officers, those statements may be used to prove the offense.
4. Title 18 U.S.C. §4. Title 18 U.S.C. §4 is directed at those individuals who have knowledge of a felony offense and take affirmative steps to conceal the crime and fail to disclose their knowledge to criminal investigators. As stated by one court, "misprision of felony" is the concealment of a felony without giving any degree of help to the individual who actually committed the crime." United States v. Perlstein, 126 F.2d 789 (3d Cir.), cert. denied, 316 U.S. 678 (1942). The statute reads as follows:

"Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both."

 - a. The Elements of Misprision of Felony. There are four (4) elements necessary to prove a crime under §4. Lancey v. United States, 356 F.2d 407 (9th Cir.), cert. denied, 385 U.S. 922 (1966).
 - 1) Felony Committed. First, a felony must have been committed by the principal.
 - 2) Knowledge. Second, the defendant must have knowledge that the felony had been committed.
 - 3) Affirmative Act of Concealment. Third, the defendant must have performed either an affirmative act of concealment or an act that concealed the true nature of the crime.
 - 4) Failure to Disclose. Finally, the defendant must fail to disclose his knowledge of the crime as soon as possible.

- a) Mere Failure to Report. A simple failure to report a crime does not, without an affirmative act of concealment, make one guilty of misprision of felony. However, where an individual lies to or misleads criminal investigators, this element may be met. United States v. Pittman, 527 F.2d 444 (4th Cir. 1975), cert. denied, 424 U.S. 923 (1976).
 - b) Self-Incrimination as a Defense. If the defendant is implicated in the crime committed by the principal, the right against compelled self-incrimination may provide a viable defense for a defendant accused of misprision of felony. Hoffman v. United States, 341 U.S. 479 (1951).
- b. Accessory After the Fact v. Misprision of Felony. There is a very close relationship between these two statutes. However, there are some differences that should be noted.
- 1) Maximum Punishment. The maximum possible punishments for both offenses are different.
 - 2) Felony Required. By statutory definition, misprision of felony can only occur when a felony crime has been committed by the principal. On the other hand, accessory after the fact may be charged regardless of the severity of the principal's offense.
 - 3) Assistance to Principal. A defendant accused of being an accessory after the fact must intentionally assist the principal of the offense, while one accused of misprision of felony need only commit an act of concealment without necessarily intending to assist the principal.

J. ADDITIONAL TEACHING POINTS FOR THE CRIME OF CONSPIRACY / PARTIES

- 1. **Introduction.** The following additional teaching points may be made by the instructor, should time permit. These points deal with the statute of limitations, and venue for a conspiracy charge and attempt to commit a crime. At the present time, these additional teaching points are not testable material.
- 2. **Statute of Limitations.** Pursuant to Title 18 U.S.C. §3282, the statute of limitations for the crime of conspiracy is five (5) years.

- a. Running of the Statute. The statute of limitations begins to run from the date the conspiracy is terminated, which could result from a variety of situations, such as consummation of the objective or abandonment. Typically, however, the statute of limitations begins to run from the date the last overt act was committed in furtherance of the conspiracy. Fiswick v. United States, 329 U.S. 211 (1946); United States v. Bornman, 559 F.3d 150 (3rd Cir. 2009).
 - b. Continuing Concealment of the Conspiracy. An agreement among the conspirators to conceal a conspiracy after its goals have been accomplished may, depending on the nature of the agreement, extend the running of the statute of limitations on the conspiracy charge. Grunewald v. United States, 353 U.S. 391 (1957).
 - c. Statute of Limitations on the Substantive Offense. The statute of limitations for any substantive offense committed by the conspirators begins to run from the date the offense was committed.
3. **Venue.** The Sixth Amendment requires that prosecution occur “in the State and District wherein the crime shall have been committed.”
- a. Venue for the Conspiracy Charge. Because the legal basis for a conspiracy charge is an agreement and an overt act in furtherance of that agreement, venue for a conspiracy charge can actually lie in two (2) separate locations.
 - 1) Agreement. Venue for the conspiracy charge will lie in the district where the agreement was entered into.
 - 2) Overt Acts. Venue for the conspiracy charge will also lie in any district in which any overt act in furtherance of the agreement was entered into. Further, since the overt act of one conspirator is considered to be the overt act of all, an overt act by one conspirator will establish venue for all conspirators in a single district, even in a district where the others were never physically present.
 - b. Venue for Substantive Offenses. If a substantive offense is committed, venue for that offense will lie in the district where the crime actually occurred.

- c. Title 18 U.S.C. §3238. If the substantive offense is not committed within any state or district (e.g., the high seas), venue will lie in the district where the offender was arrested or into which he or she was first brought.
- 4. **Attempt.** Federal law provides no statutory definition of attempt to commit a crime. Precedent, however, establishes that to prove an attempt, the government must show a defendant's intent to commit the proscribed criminal conduct together with the commission of an act that constitutes a substantial step towards the commission of the proscribed criminal activity. United States v. Pennyman, 889 F.2d 104 (6th Cir. 1989). Thus the crime of attempt requires proof of specific intent to complete the acts constituting the substantive offense, regardless of whether the choate offense is a general or specific intent crime.
 - a. Impossibility. Factual impossibility, that is, the defendant is unable to accomplish what he intends because of some facts unknown to him, is not a defense to an attempt charge.
 - b. Abandonment/Withdrawal. The Model Penal Code recognizes abandonment as an affirmative defense to attempt under circumstances manifesting a complete and voluntary renunciation of criminal purpose. However, circuits addressing this issue have ruled that after a defendant has evidenced the necessary intent and has committed an act constituting a substantial step toward the commission of the offense, he has committed the crime of attempt, and can withdraw only from the commission of the substantive offense. See, e.g. United States v. Shelton, 30 F.3d 702 (6th Cir. 1994).

V. OBSTRUCTION OF JUSTICE

A. RAPPORT AND OPENING STATEMENT

- 1. The obstruction of justice statutes are designed to protect the integrity of the entire federal court system, whether the proceedings are administrative and pending before a Federal agency; legislative and pending before Congress; or judicial and pending as civil, or criminal proceedings before any level of the Federal judiciary.
- 2. When viewed and used together, these statutes provide a federal criminal investigator with powerful weapons against any person who seeks to corrupt ongoing investigations and court proceedings, as well as possible future investigations.

3. This course will examine four specific provisions of the United States Code that pertain to obstruction of justice in regard to criminal investigations and proceedings.

B. ENABLING PERFORMANCE OBJECTIVES (EPO)

1. EPO #19: Identify conduct that can be prosecuted under Title 18 U.S.C. §§1503 and 1510.
2. EPO #20: Identify the groups of persons who are protected under Title 18 U.S.C. §§1512 and 1513.
3. EPO #21: Identify conduct that constitutes "tampering" in violation of Title 18 U.S.C. §1512 and conduct that constitutes "retaliation" in violation of Title 18 U.S.C. §1513.

C. EPO #19: IDENTIFY CONDUCT THAT CAN BE PROSECUTED UNDER TITLE 18 U.S.C. §§1503 AND 1510

1. Title 18 U.S.C. §1503. This statute was enacted to ensure that court proceedings would take place in an atmosphere that would be conducive to seeking and finding the truth, without fear of intimidation, coercion, or corruption.
2. The Statute. Entitled "Influencing or Injuring Officer or Juror Generally," the statute provides as follows:

"(a) Whoever, corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede the due administration of justice, shall be punished as provided in subsection (b).
3. Title 18 U.S.C. §1503 serves to protect the individuals involved in the federal court system and the integrity of the system itself.

- a. Section 1503 can be broken down into two distinct parts. The first part of §1503 covers obstruction of justice by those who would tamper with, or retaliate against jurors or officers of the court. Officers of the court include judges, prosecutors, and defense counsel. Law enforcement officers are not covered under §1503 as officers of the court.
 - b. The second part of §1503 contains an omnibus clause, or catch-all provision that prohibits any conduct that would obstruct the due administration of justice. The omnibus clause allows prosecutions for obstruction of justice even if the defendant's actions were not specifically prohibited in § 1503, or if these actions were against individuals other than jurors and officers of the court, witnesses, for example. United States v. Simmons, 591 F.2d 206 (3rd Cir. 1979). The defendant was charged with two counts of obstructing justice under the omnibus clause of §1503. In one count he was charged after he destroyed documents that had been subpoenaed by the grand jury. In the second count he was charged after he instructed his employees to withhold information from the grand jury after they were subpoenaed to testify. The court held that in both instances the defendant's conduct obstructed the due administration of justice because it affected the ability of the grand jury to carry out its function. U.S. v. Rovetuso, 768 F.2d 809 (7th Cir. 1985). (Section 1503 is violated when a defendant interferes with the due administration of justice by tampering with a witness). There is no requirement that the defendant be part of the judicial proceeding in order to violate § 1503. United States v. Barfield, 999 F. 2d 1520, 1524 (11th Cir. 1993).
4. The Elements of the Statute.
- a. For §1503 Tampering:
 - 1) Whoever corruptly, or by threats, or force, or by any threatening letter, or communication,
 - 2) Endeavors to influence, intimidate, or impede,
 - 3) Any grand or petit juror, or officer in, or of , any court of the United States,
 - 4) In the discharge of his duty.
 - b. For §1503 Retaliation (juror):

- 1) Whoever injures,
 - 2) Any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him or on account of his being or having been such juror.
- c. For §1503 Retaliation (judge and officers of the court):
 - 1) Whoever injures,
 - 2) Any such officer, magistrate judge or other committing magistrate in his person or property on the account of the performance of his official duties.
- d. For §1503 (omnibus):
 - 1) Whoever, corruptly, or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes or endeavors to influence, obstruct, or impede,
 - 2) the due administration of justice.
5. Intent. The government must also prove that the defendant acted "corruptly," which is to say with an evil or wicked intent. United States v. Barfield, 999 F.2d 1520, 1524 (11th Cir. 1993). The action taken by the defendant must be with the intent to influence judicial or grand jury proceedings. United States v. Aguilar, 515 U.S. 593 (1995) (holding that uttering false statements to an investigating agent who might or might not testify before a grand jury is not sufficient for §1503 liability). This is a "specific intent" crime, so if the intent cannot be shown, the crime cannot be charged. United States v. Bashaw, 982 F.2d 168 (6th Cir. 1992). To establish a violation of § 1503, the government must demonstrate that the defendant knew of the pending judicial proceeding and specifically intended to impede its administration. United States v. Guzzino, 810 F.2d 687, 696 (7th Cir. 1987).

6. Factual Impossibility. Whether the attempted obstruction of justice was successful is irrelevant for charging a violation of §1503. The statute proscribes the endeavor to influence or obstruct the administration of justice; thus the impossibility of accomplishing the goal of the obstruction of justice does not prevent a prosecution for the endeavor to accomplish such a goal. United States v. Bucey, 876 F.2d 1297 (7th Cir. 1989). (Defendant, with knowledge of the ongoing grand jury investigation and of the subpoena issued to the witness, counseled the witness on how to role-play his grand jury testimony with his attorney, and instructed the witness to provide false and misleading testimony to the grand jury. The witness however, was an undercover government agent who never intended to testify in front of the grand jury). Osborn v. United States, 385 U.S. 323 (1966). (Defendant employed an individual to contact a prospective juror and offer him a bribe. The individual was an informant for the government. Although the informant never intended to carry out the scheme to bribe the juror, that did not preclude the defendant's conviction for endeavoring to bribe a juror).
7. Examples. The following cases show actions that constitute violations of §1503.
 - a. Destroying documents sought by a grand jury. United States v. Ruggiero, 934 F.2d 440 (2nd Cir. 1991).
 - b. Attempting to persuade a witness to falsely recant his trial testimony while the defendant's case is on appeal. United States v. Moody, 977 F.2d 1425 (11th Cir. 1992).
 - c. Soliciting a third-party to approach the judge in the defendant's case in an effort to influence the sentence to be imposed at the defendant's upcoming sentencing. United States v. Glickman, 604 F.2d 625 (9th Cir. 1979).
 - d. Standing up during the testimony of a witness, shaking his fist, and saying "You better not!" constituted obstruction of the due administration of justice. United States v. Harris, 558 F.2d 366 (7th Cir. 1977).
 - e. Falsifying a report likely to be given to a grand jury. United States v. Mullins, 22 F.3d 1365 (6th Cir. 1994).
 - f. Endeavoring to suborn perjury. United States v. Kenny, 973 F.2d 339 (4th Cir. 1992).

- g. Giving false denials of knowledge and memory or false and evasive testimony. United States v. Langella, 776 F.2d 1078 (2nd Cir. 1985).
- 8. Title 18 U.S.C. §1505. This statute was enacted to ensure that administrative and civil proceedings were as free from corruption, fraud, and threats as criminal proceedings. Thus, it covers proceedings before any agency, whether administrative or civil in nature, as well as any actions that are designed to impede any investigations that are being conducted by any agency or by Congress. (Although there is no EPO regarding §1505 this is included for the instructors' information)
- 9. The Statute. Entitled "Obstruction of Proceedings Before Departments, Agencies, and Committees," the statute provides as follows:
 - a. *"Whoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so; or*
 - b. *Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress - Shall be fined under this title or imprisoned not more than five years, or if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both."*
- 10. The Elements of the Statute. In order to prove a violation of § 1505, the following three (3) elements must be shown. United States v. Price, 951 F.2d 1028 (9th Cir. 1991).
 - a. Pending Proceeding. First, there must be a "proceeding" pending before a department or agency of the United States.

- b. Knowledge. Second, the defendant must be aware of the pending proceeding(s).
 - c. Intent. Third, the defendant must have intentionally endeavored to corruptly influence, obstruct or impede the pending proceeding(s).
11. Examples. The following cases show actions that constitute violations of §1505.
- a. Destroying documents after an administrative subpoena had been served on a corporation in the course of a Department of Energy audit. United States v. Sutton, 732 F.2d 1483 (10th Cir. 1984).
 - b. Submitting false reports by written and oral representations in a Department of Labor investigation. United States v. Sullivan, 618 F.2d 1290 (8th Cir. 1980).
 - c. Making false statements to a Department of Defense auditor. United States v. Leo, 941 F.2d 181 (3rd Cir. 1991).
12. Title 18 U.S.C. §1510. Prior to the enactment of §1510 it was not a crime to obstruct a criminal investigation or inquiry before the initiation of proceedings within the scope of §1503 or §1505. This statute was enacted to close the loophole on the protection of witnesses and informants created as a result of the "pending proceeding" requirement of §1503 and §1505, and provide for the prosecution of those who would interfere with the criminal investigative process. When initially enacted §1510 prohibited any actions taken to obstruct federal criminal investigations by bribery, intimidation, misrepresentation, force or threats of force, and for retaliation against informants. In 1982 upon enactment of 18 U.S.C. §1512, section 1510 was amended. As amended §1510 prohibits any actions taken to obstruct federal criminal investigations by bribery. (See United States v. King, 762 F.2d 232 (2nd Cir. 1985)). Section 1510 is aimed at those who try to buy the silence of an actual or potential witness through bribery. The statute also creates additional criminal liability when an officer of a financial institution "tips off" a customer or any other person about either the existence or the contents of a grand jury subpoena for financial information. However, that portion of the statute is beyond the purview of this course.
13. The Statute. Entitled "Obstruction of Criminal Investigations," the statute provides, in pertinent part, as follows:

“(a) Whoever willfully endeavors by means of bribery to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator shall be fined under this title, or imprisoned not more than five years, or both.”

14. The Elements of the Statute. To prove a violation of §1510, the government must establish the following elements.
 - a. Willfulness. First, the government must show that the defendant intentionally tried to obstruct, delay, or prevent another person from communicating information to a criminal investigator.
 - b. Bribery. Second, the government must show that the attempt to silence the witness was by means of bribery (offering something of value to the witness).
 - c. Criminal Statute. Finally, the information that the defendant is trying to stop from reaching criminal investigators must relate to a violation of a criminal statute of the United States.
15. Knowledge Required. The government must show that the defendant had actual knowledge that the intended recipient of the information was a federal criminal investigator. United States v. Lippman, 492 F.2d 314 (6th Cir. 1974). However, the defendant need not actually know that the information has been or is about to be supplied to a federal criminal investigator. It is required only that the defendant believed that information might be supplied to a federal criminal investigator.
16. Victim's Intent. The government is not required to show that the victim actually intended to give information to a federal criminal investigator or that the defendant knew the contents of the information. Further, it is not necessary to prove that the victim felt threatened (i.e., the victim could be a willing participant in the obstruction).
17. Investigation Not Required to be Ongoing. To successfully prosecute a defendant for violating §1510, there is no requirement that an investigation be underway or ongoing. Actions taken prior to the commencement of a formal investigation come within the statute if the prosecution proves that the defendant knew or reasonably believed that the person sought to be influenced had relevant information and was likely to share it with law enforcement officers.

D. EPO #20: IDENTIFY THE GROUPS OF PERSONS WHO ARE PROTECTED UNDER TITLE 18 U.S.C., §§1512 AND 1513

1. Title 18 U.S.C. §1512. Congress passed the Victim Witness Protection Act in 1982 which created §1512 and §1513. Section 1512 was enacted to protect various classes of individuals before they testify or communicate information to a law enforcement officer. It prohibits conduct that is intended to drastically impact and subvert the lawful presentation of evidence in federal proceedings or the communication of information to a federal law enforcement officer or federal judge. It is important to note that this statute covers both "violent" tampering, as well as more subtle forms of tampering, such as deliberately using false and misleading statements to cause a witness to either fail to appear or to destroy or alter evidence.

2. §1512. Tampering with a witness, victim, or an informant

"(a) (1) Whoever kills or attempts to kill another person, with intent to--

(A) prevent the attendance or testimony of any person in an official proceeding;

(B) prevent the production of a record, document, or other object, in an official proceeding; or

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(2) Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to--

(A) influence, delay, or prevent the testimony of any person in an official proceeding;

(B) cause or induce any person to--

(i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(ii) alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;

(iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(iv) be absent from an official proceeding to which that person has been summoned by legal process; or

(C) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

... shall be punished as provided in paragraph (3).

(3) The punishment for an offense under this subsection is--

(A) in the case of murder (as defined in section 1111), the death penalty or imprisonment for life, and in the case of any other killing, the punishment provided in section 1112;

(B) in the case of--

(i) an attempt to murder; or

(ii) the use or attempted use of physical force against any person;

imprisonment for not more than 20 years; and

(C) in the case of the threat of use of physical force against any person, imprisonment for not more than 10 years.

(b) Whoever knowingly uses intimidation, threatens or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to--

(1) influence, delay or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to--

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than ten years, or both.

(c) Whoever corruptly--

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be fined under this title or imprisoned not more than 20 years, or both.

(d) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from--

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in

*such prosecution or proceeding;
or attempts to do so, shall be fined under this title or imprisoned
not more than one year, or both.*

*(e) In a prosecution for an offense under this section, it is an
affirmative defense, as to which the defendant has the burden of
proof by a preponderance of the evidence, that the conduct
consisted solely of lawful conduct and that the defendant's sole
intention was to encourage, induce, or cause the other person to
testify truthfully.*

(f) For the purposes of this section--

*(1) an official proceeding need not be pending or about to be
instituted at the time of the offense; and*

*(2) the testimony, or the record, document, or other object need
not be admissible in evidence or free of a claim of privilege.*

*(g) In a prosecution for an offense under this section, no state of
mind need be proved with respect to the circumstance--*

*(1) that the official proceeding before a judge, court, magistrate,
grand jury, or government agency is before a judge or court of the
United States, a United States magistrate [United States magistrate
judge], a bankruptcy judge, a Federal grand jury, or a Federal
Government agency; or*

*(2) that the judge is a judge of the United States or that the law
enforcement officer is an officer or employee of the Federal
Government or a person authorized to act for or on behalf of the
Federal Government or serving the Federal Government as an
adviser or consultant.*

*(h) There is extraterritorial Federal jurisdiction over an offense
under this section.*

*(i) A prosecution under this section or section 1503 may be
brought in the district in which the official proceeding (whether or
not pending or about to be instituted) was intended to be affected or
in the district in which the conduct constituting the alleged offense
occurred.*

*(j) If the offense under this section occurs in connection with a trial
of a criminal case, the maximum term of imprisonment which may
be imposed for the offense shall be the higher of that otherwise
provided by law or the maximum term that could have been
imposed for any offense charged in such case.*

*(k) Whoever conspires to commit any offense under this section
shall be subject to the same penalties as those prescribed for the
offense the commission of which was the object of the conspiracy."*

3. Section 1512 encompasses four distinct offenses.

a. Killing or attempting to kill a victim, witness, or informant;

- b. Intimidating, threatening, or misleading a witness, victim, or informant; and
 - c. Harassing a witness, victim, or informant.
 - d. Destroying or concealing documents to impair their integrity or availability in a proceeding.
4. The Elements of the Statute. The following elements must be proven to convict a defendant of violating §1512.
- a. Killing or Attempting to Kill a Victim, Witness or Informant
That the defendant killed, attempted to kill, or used physical force against a witness, victim or informant, *with the intent to*:
 - 1) Prevent their attendance or testimony in an official proceeding, or
 - 2) Prevent the production of documents, or other objects in an official proceeding, or
 - 3) Prevent the communication of a federal criminal violation to a federal law enforcement officer or judge. The government must show that there was a reasonable likelihood that the relevant communication would have been provided to a federal officer. The government need not show there would have been a communication beyond a reasonable doubt, nor that it was more likely than not. The government need only establish the likelihood of the communication was more than remote, outlandish, or hypothetical. Fowler v. United States, 131 S. Ct. 2045 (2011).
 - 4) Intimidating, Threatening or Misleading a Witness, Victim or Informant
 - 5) That the defendant knowingly used intimidation, threats, or engaged in misleading conduct toward another person with the intent to:
 - 6) Prevent their attendance or testimony in an official proceeding, or
 - 7) Prevent the production of documents or other objects in an official proceeding, or
 - 8) Prevent the communication of a federal criminal violation to a federal law enforcement officer or judge.

- b. Harassing a Witness, Victim or Informant
 - 1) That the defendant intentionally harassed a witness, victim or informant which resulted in:
 - 2) Hindering, delaying, preventing, or dissuading the person from:
 - 3) Attending or testifying in an official proceeding, or
 - 4) Reporting to a law enforcement officer or judge of the United States a violation of federal law.
 - c. Destruction, Mutilation or Concealment of Documents or Objects
 - 1) That the defendant corruptly altered, destroyed, mutilated, or concealed a record, document or other object with the intent to:
 - 2) Impair the object's integrity or availability for use in an official proceeding
- 5. Who is Protected? The following persons are protected by the provisions of §1512.
 - a. Victims;
 - b. Witnesses; and
 - c. Informants
 - 6. Timing of the Offense. This statute covers actions by a defendant that take place before an individual testifies or provides information to the government.
 - 7. Extraterritorial Jurisdiction. There is extraterritorial federal jurisdiction over an offense under §1512. Thus, the acts which constitute a basis for the charge do not have to occur within the jurisdiction of the United States.
 - 8. Title 18 U.S.C. §1513. This statute protects witnesses, victims, and informants after they have testified or reported information to a criminal investigator or law enforcement officer. Under §1513, two types of conduct are addressed. First, the statute addresses threats of retaliation; second, the statute addresses attempts at retaliation.
 - 9. The Statute. Entitled "Retaliating Against a Witness, Victim, or an Informant," the statute provides as follows.

§1513. Retaliating against a witness, victim, or an informant
(a) (1) *Whoever kills or attempts to kill another person with intent to retaliate against any person for--*

(A) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or

(B) providing to a law enforcement officer any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings,
shall be punished as provided in paragraph (2).

(2) The punishment for an offense under this subsection is--

(A) in the case of a killing, the punishment provided in sections 1111 and 1112; and

(B) in the case of an attempt, imprisonment for not more than 20 years.

(b) Whoever knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for--

(1) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or

(2) any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings given by a person to a law enforcement officer; or attempts to do so, shall be fined under this title or imprisoned not more than ten years, or both.

(c) If the retaliation occurred because of attendance at or testimony in a criminal case, the maximum term of imprisonment which may be imposed for the offense under this section shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(d) There is extraterritorial Federal jurisdiction over an offense under this section.

(e) Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

[(f)](e) Whoever conspires to commit any offense under this

section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.'

10. Section 1513 encompasses three distinct offenses when retaliatory action is taken against a victim, witness or informant on account of their involvement in a federal investigation or proceeding.
 - a. Killing or attempting to kill a witness, victim or informant
 - b. Causing bodily injury to a witness, victim or informant, or damage to their property,
 - c. Taking any harmful action against a witness, victim or informant.
11. The Elements of the Statute. The following elements must be proven to convict a defendant of violating §1513.
 - a. Killing or Attempting to Kill a witness, victim or informant.
 - 1) That the defendant killed or attempted to kill a witness, victim or informant with the intent to retaliate against them for:
 - 2) Their attendance or testimony in an official federal proceeding, or
 - 3) The production of a document or other object in a federal proceeding, or
 - 4) The communication of a federal violation to a federal law enforcement officer.
 - 5) Causing bodily injury to a witness, victim or informant or damage to their property.
 - 6) That the defendant knowingly engaged in any conduct which
 - 7) Caused bodily injury to another person or their property, or threatened to do so with the intent to retaliate against them for:
 - 8) Their attendance or testimony in an official federal proceeding, or
 - 9) The production of a document or other object in a federal proceeding, or
 - 10) The communication of a federal violation to a federal law enforcement officer.

Taking any harmful action against a witness, victim or informant.

- 11) That the defendant knowingly, with the intent to retaliate
 - 12) Took any harmful action, including interference with the lawful employment or livelihood of any person,
 - 13) For providing to a law enforcement officer any truthful information relating to the commission or possible commission of any federal offense.
12. In order to prove a violation of any provision of §1513, the government must prove the following elements.
- a. An Act. First, the government must prove that the defendant retaliated against, attempted to retaliate against, or threatened to retaliate against, an individual who had testified or reported information to a criminal investigator.
 - b. Intent. Second, the government must prove that the defendant acted with the specific intent to retaliate against the individual for his or her testimony or reporting.
 - c. Knowledge. Third, the government must prove that the defendant intentionally took action against the individual with the knowledge that the victim or another person had been a party to or a witness in a federal proceeding or had reported information to a federal law enforcement officer.
 - d. Proof. To sustain a retaliation charge the defendant must engage in conduct that caused or threatened a witness with bodily injury, the defendant acted knowingly with specific intent to retaliate against the witness for information the witness divulged to law enforcement authorities about a federal offense, and the officials to which the witness divulged information were federal agents. A witnesses interaction with local authorities, which just happen to be reported to federal authorities, does not provide the requisite federal contacts under the statute. United States v. Draper, 553 F.3d 174 (2nd Cir. 2009).
13. Extraterritorial Jurisdiction. Again, there is extraterritorial federal jurisdiction over an offense under §1513.

E. EPO #21: IDENTIFY CONDUCT THAT CONSTITUTES “TAMPERING” IN VIOLATION OF TITLE 18 U.S.C. §1512 AND CONDUCT THAT CONSTITUTES “RETALIATION” IN VIOLATION OF TITLE 18 U.S.C. § 1513

1. The following acts constitute “tampering” in violation of 18 U.S.C. § 1512.
 - a. Killing or attempting to kill a person to prevent testimony or production of documents or information. United States v. Galvan, 949 F.2d 777 (5th Cir. 1991).
 - b. Using intimidation tactics, although the witness does not have to be intimidated in fact. United States v. Johnson, 903 F.2d 1084 (7th Cir. 1990).
 - c. Using physical force against a witness or informant. United States v. Scaife, 749 F.2d 338 (6th Cir. 1984).
 - d. Threatening the use of physical force. United States v. Dunning, 929 F.2d 579 (10th Cir. 1991).
 - e. Corruptly persuading a person not to testify.
2. The following demonstrates “retaliation” in violation of 18 U.S.C. § 1513.
 - a. Actions that do not rise to the level of attempt may be successfully prosecuted as “endeavors” under this statute, if the goal was to cause injury. United States v. Garcia-Pupo, 845 F.2d 8 (1st Cir. 1988).
 - b. Threats to retaliate are enough to prosecute under this statute when it can be proven that the defendant acted with the specific intent to obstruct a federal investigation or proceeding. United States v. Brown, 937 F.2d 32 (2nd Cir. 1991).
 - c. The fact that a threat is never carried out does not act as a defense to a charge of violating §1513. United States v. Maggitt, 784 F.2d 590 (5th Cir. 1986).

F. §1503 OMNIBUS CLAUSE AND §1512

1. With the passage of the Victim and Witness Protection Act in 1982 it was possible for a person to be charged with witness tampering under §1512 or under §1503 (Omnibus Clause). An issue for the courts to decide was whether §1512 was the exclusive statute for charging witness tampering, or could a person be charged with witness tampering under the Omnibus Clause of §1503.

2. A majority of circuits have rejected the idea that §1512 is the exclusive statute for charging witness tampering, and have held that §1503 (Omnibus Clause) may be used if desired by the government. Keep in mind that the pending proceeding requirement must be met in prosecution under §1503 (Omnibus Clause).
3. Cases that have held that §1512 is not the exclusive statute for charging witness tampering:
 - a. United States v. Kenny, 973 F.2d 339 (4th Cir. 1992)
 - b. United States v. Branch, 850 F.2d 1080 (5th Cir. 1988)
 - c. United States v. Wesley, 748 F. 2d 962 (5th Cir. 1984)
 - d. United States v. Tackett, 113 F.3d 603 (6th Cir. 1997)
 - e. United States v. Maloney, 71 F.3d 645 (7th Cir. 1995)
 - f. United States v. Rovetuso, 768 F.2d 809 (7th Cir. 1985)
 - g. United States v. Risken, 788 F.2d 1361 (8th Cir. 1986)
 - h. United States v. Ladum, 141 F.3d 1328 (9th Cir. 1998)
 - i. United States v. Moody, 977 F.2d 1425 (11th Cir. 1992)
4. Cases that have held that §1512 is the exclusive statute for charging witness tampering:
 - a. United States v. Masterpol, 940 F.2d 760 (2nd Cir. 1991)
 - b. United States v. Hernandez, 730 F.3d 895 (2nd Cir. 1984)

VI. FEDERAL FRAUD STATUTES

A. RAPPORT AND OPENING STATEMENT

1. Title 18 U.S.C. §1341, Mail Fraud, Title 18 U.S.C. §1343, Wire Fraud, and Title 18 U.S.C. §2314, Interstate Transport of Stolen Property (or the National Stolen Property Act) are three of the most important statutes utilized by Federal criminal investigators to combat the full gamut of frauds, schemes and swindles that know no state boundaries. In fact, crimes which would otherwise be purely state or local offenses can gain Federal stature by the simple act of using the United States mails, an interstate commercial carrier, the interstate communications system, or any other facility of interstate commerce.

2. Title 18 U.S.C. §1341 is based on Article I, section 8 of the United States Constitution, which vests authority in the Federal government over "post offices and post roads". By 1872, when the statute was enacted, the United States mails had become the easiest and least expensive means for communicating throughout the country and its territories. Unfortunately, the unscrupulous were quick to capitalize on this new convenience as a mechanism for committing frauds. The advantages of using the mails to commit schemes, frauds and swindles were many: fewer face-to-face transactions, making identification and prosecution more difficult; the availability of rented post office boxes, which allowed those so inclined to operate under a false name in a town where they did not reside; the limited resources of state and local law enforcement authorities, which made investigations of crimes originating in other states difficult to investigate; and the absence of laws that made conduct spanning more than one state illegal. Congress closed that door with the enactment of this statute in 1872.
3. More recently, with the advent of the telegraph, telephone, radio, television and the Internet, as well as improved means to travel in interstate and foreign commerce, creative criminals have devised means of defrauding victims by relying on these various interstate communications facilities and travel means. Schemes have ranged from the religious, such as that perpetrated by Jim and Tammy Faye Bakker, to the "boiler room" scams which target older people and obtain money via telephone using various bullying techniques. New schemes are arising on a daily basis on the Internet. In addition, con artists lure their victims over state lines and from overseas to mislead them face-to-face. As a result, these three statutes remain a vital part of the Federal investigator's arsenal against crime.

B. ENABLING PERFORMANCE OBJECTIVES (EPO)

1. EPO #22: Identify and apply the elements of the Mail Fraud statute, Title 18 U.S.C. §1341, and the Wire Fraud statute, Title 18 U.S.C. § 1343.
2. EPO #23: Identify and apply the elements of the National Stolen Property Act, Title 18 U.S.C. §2314.

C. EPO #22: IDENTIFY AND APPLY THE ELEMENTS OF THE MAIL FRAUD STATUTE, TITLE 18 U.S.C. §1341, AND THE WIRE FRAUD STATUTE, TITLE 18 U.S.C. §1343.

1. Title 18 U.S.C. §1341. Titled "Frauds and Swindles", but commonly referred to as the "Mail Fraud Statute", this statute provides as follows:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives there from, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both."

2. Elements of Title 18 U.S.C. §1341. Title 18 U.S.C. §1341 is designed to criminalize the use of the mails to facilitate a fraud, scheme or other illegal plan. In order for a person to be convicted under this statute, the government must prove beyond a reasonable doubt each of the following five elements:
 - a. Any person who
 - b. Intentionally
 - c. Devises a fraudulent scheme, and
 - d. Uses or causes the mails to be used (Postal Service or private/commercial interstate carrier)
 - e. In furtherance or in support of the scheme.

In other words, to establish mail fraud, the government must prove: (1) a scheme to defraud by means of material false representations or promises, (2) intent to defraud, (3) reasonable foreseeability that the mail would be used, and (4) the mail was used in furtherance of some essential step in the scheme. United States v. Bryant, 606 F.3d 391 (8th Cir. 2010); American Automotive Accessories, Inc. v. Fishman, 175 F.3d 534 (7th Cir. 1999); Viriden v. Graphics One, 623 F.Supp. 1417 (C.D. Cal. 1985). If these elements are proven and the defendant is found guilty, he/she can be fined up to \$250,000 per count or imprisoned up to 20 years, or both. If the victim or target of the scheme is a financial institution, the fine can be up to \$1,000,000 or imprisonment of up to 30 years, or both.

3. Proof of the Elements of Mail Fraud

- a. What is "intentionally"? An action is proved to have been taken with specific intent if it is proven that "the scheme was reasonably calculated to deceive persons of ordinary prudence and comprehension". Viriden, supra, at 1422. How can intent be proven? Intent is proven by showing the scheme itself. The scheme may utilize an affirmative misrepresentation of fact, or may instead involve the deceitful concealment of material facts. Viriden, supra. A prior warning to cease and desist fraudulent activity can serve as evidence of specific intent to defraud in a subsequent, similar scheme. United States v. Phipps, 595 F.3d 243 (5th Cir. 2010)

What is a "fraudulent scheme"? A fraudulent scheme is the intentional presentation of falsehoods as if true, with the goal of causing someone to part with something of value under false pretenses. The words "to defraud" commonly refer to "wronging one in his property rights by dishonest methods or schemes, and usually signify deprivation of something of value by trick, deceit, chicane or overreaching." McNally v. United States, 483 U.S. 350 (1987). Schemes depriving people from controlling their assets by withholding information necessary to make discretionary economic decisions falls within the statute. United States v. Carlo, 507 F.3d 799(2nd Cir. 2007). Does the misrepresentation have to be material to the fraud? Under the holding of Neder v. United States, 527 U.S. 1 (1999), the answer is yes. The Supreme Court pointed out that the well-settled meaning of "fraud" required a misrepresentation or concealment of material fact, and therefore, the materiality of the falsehood is an element of the federal mail fraud statute. Neder, *supra* at 22-23. A matter is material if "(a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it." Restatement (Second) of Torts §538 (1976). A misrepresentation "must have the purpose of inducing the victim of the fraud to part with the property or undertake some action that he would not otherwise do absent the misrepresentation or omission." United States v. Daniel, 329 F.3d 480, 487 (6th Cir. 2003); (it is material if it has a tendency to influence or is capable of influencing a decision) Neder, *supra* at 16; United States v. McAuliffe, 490 F.3d 526 (6th Cir.), *cert. denied*, 552 U.S. 976 (2007). Whether or not a victim in fact relied upon a defendant's false representation is irrelevant in fraud cases. United States v. Ghilarducci, 480 F.3d 542 (7th Cir.), *cert. denied*, 552 U.S. 909 (2007).

- b. In 1988, Congress expanded the definition of "scheme or artifice to defraud" when it enacted Title 18 U.S.C. §1346, which states: "*For the purpose of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services.*" Thus, no longer does the scheme have to involve the taking of money or tangible personal property, as previously defined in McNally, supra. In a mail/wire fraud case regarding misuse of corporate positions by executives seeking private gain, the scheme to defraud must involve bribery or kickbacks that deprive the corporation or its shareholders of honest services. Skilling v. U.S., 2010 U.S. LEXIS 5259. See also Black v. U.S., 2010 U.S. LEXIS 5253. This statute can also be used to reach schemes which deprive the public of the honest services of public officials. Intangible and tangible property rights are covered by the statute. United States v. Bucey, 876 F.2d 1297, 1309 (7th Cir.), cert. denied, 493 U.S. 1004 (1989).
- c. What act "causes the mails to be used"? It is not necessary to show that the defendant personally used the mail services, but only that the defendant caused the mail services to be used by "acting with the knowledge that their use would follow in the ordinary course of business, or where such use could reasonably be foreseen." American Automotive Accessories, Inc. v. Fishman, 175 F.3d 534, 542 (7th Cir. 1999), citing United States v. Alexander, 135 F.3d 470, 474-475 (7th Cir. 1998); see also, United States v. Wicker, 80 F.3d 263 (8th Cir. 1996); United States v. Fox, 69 F.3d 15 (5th Cir. 1995). Thus, evidence will be sufficient to meet this element of the offense when it can be proven either that:
- 1) the defendant personally used the mails for the purpose of executing a scheme to defraud; or
 - 2) the defendant acted knowing that the use of the mails would follow in the ordinary course of business; or
 - 3) even when the use of the mails was not intended, such use was reasonably foreseeable. Virden v. Graphics One, 623 F.Supp. 1417, 1422 (C.D. Cal. 1985), citing United States v. Garner, 663 F.2d 834, 838 (9th Cir. 1981), cert. denied, 456 U.S. 905 (1982); see also American Automotive Accessories, Inc., supra, at 542.

d. Each mailing which is in furtherance of the scheme is a separate offense, and will support a separate charge. United States v. McClelland, 868 F.2d 704 (5th Cir. 1989). The mailing can be either interstate or intrastate (Article I, section 8, United States Constitution). What is “in furtherance or in support of the scheme”? The mailings do not have to be an essential part of the planned scheme, but they must be made for the purpose of executing the scheme. Virden v. Graphics One, 623 F.Supp. 1417,1423 (C.D. Cal. 1985). The mailings do not have to occur at the time of the original fraud. If the defendant is engaged in an ongoing scheme, and the mailings are both reasonably foreseeable and allow the scheme to continue undetected, the defendant can be charged with mail fraud for each mailing that occurs, even if the mailings occur years after the original fraud. United States v. Lane, 474 U.S. 438, 451-2 (1986) (mailings are within the five-year statute of limitations if their purpose is “to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place”); Schmuck v. United States, 489 U.S. 705 (1989) (in odometer rollback scheme, later mailings of titles by state transportation department were reasonably foreseeable and facilitated the continuance of the scheme). Communications that occur after initial purchase into the fraudulent scheme, designed to lull the victim into a false sense of security, postpone inquiries or complaints, or make the transaction less suspect, are mailings in furtherance of the scheme. United States v. Phipps, 595 F.3d 243 (5th Cir. 2010). (faxing updated “contact” information in anticipation of future dealings with the victims was important in lulling the victims into believing the scheme was a legal, secure financial program). Where the mails and wires were used to purchasing Microsoft software at discounted prices and reselling it to unauthorized users contrary to the agreement with Microsoft is a violation of both statutes. The right of payment for the sale of software was “money or property” as defined by the statutes and neither statute requires a transfer directly to the defendant from the party deceived by the defendant. United States v. Ali, 620 F.3d 1062 (9th Cir. 2010).

4. Title 18 U.S.C. §1343. Officially titled “Fraud by Wire, Radio, or Television”, this statute is commonly referred to as the “Wire Fraud Statute”. It provides:
- a. *“Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.”*
 - b. Elements of Title 18 U.S.C. §1343. Cases consistently state that the elements of Title 18 U.S.C. §§1341 and 1343 are the same. American Automotive Accessories, Inc. v. Fishman, 175 F.3d 534, 542 (7th Cir. 1999); United States v. Ames Sintering Co., 927 F.2d 232, 234 (6th Cir. 1990); United States v. Puckett, 692 F.2d 663, 669 (10th Cir.), cert. denied, 459 U.S. 1091 (1982). One substantial difference, however, is that, to be indictable under Section 1343, the wire transmission must have been **interstate**. Puckett, supra. Purely **intrastate** telephone calls and transmissions do not violate the statute.
 - c. Following hurricane Katrina, the defendant applied for and **received Government funds to rebuild a home. However, the** defendant did not own the property, and used the money, which was electronically wired to her account, for non-rebuilding expenditures. Her actions deprived the government of the funds economic value for aiding homeowners post Katrian rebuilding efforts. United States v. Dowl, 619 F.3d 494 (5th Cir. 2010).

The communication required under the statute does not have to be directed to the victim of the fraudulent scheme, and the defendant does not have to be the person who made the wire communication if he participated in devising the scheme to defraud and the use of interstate wires was foreseeable. United States v. Puckett, 692 F.2d 663, 669 (10th Cir.), cert. denied, 459 U.S. 1091 (1982). The scheme does not have to actually succeed, the victim does not have to actually suffer a loss, nor does the defendant have to secure a gain to be prosecuted under this statute, and the communication itself does not have to actually further the scheme. United States v. Ames Sintering Co., 927 F.2d 232, 235 (6th Cir. 1990). Interstate and international telephone calls seeking a person to execute a horse to complete an insurance scheme supported wire fraud convictions. United States v. Lindemann, 85 F.3d 1232 (7th Cir.), cert. denied, 519 U.S. 966 (1996). Similarly, interstate telephone calls made by patients to schedule appointments with a medical doctor who fraudulently treated them for infertility were properly indicted as wire fraud charges. United States v. Jacobson, 1993 U.S. App. LEXIS 22534 (4th Cir. Va. Sept. 3, 1993)(unpublished opinion), cert. denied, 511 U.S. 1069 (1994). Finally, as with the Mail Fraud statute, wire transmissions designed to lull a victim into complacency, thereby keeping him from discovering the fraud and contacting the authorities, can be charged even though they occur after the defendant has obtained something of value from the victim. In effect, these “lulling” wires extend the five-year statute of limitations in a wire fraud case. See, e.g., United States v. Rogers, 9 F.3d 1025 (2nd Cir. 1993); United States v. Phipps, 595 F.3d 243 (5th Cir. 2010).

D. EPO #23: IDENTIFY AND APPLY THE ELEMENTS OF THE NATIONAL STOLEN PROPERTY ACT, TITLE 18 U.S.C. §2314

1. Title 18 U.S.C. §2314. The National Stolen Property Act, commonly referred to as the “Interstate Transport of Stolen Property” or “ITSP”, was enacted to federalize thefts and frauds that crossed state lines. In 1990, the statute was amended to encompass the transportation of stolen goods through foreign commerce. The statute provides as follows:
 - a. *“Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5000 or more, knowing the same to have been stolen, converted or taken by fraud; or*

- b. *"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person or persons to travel in, or to be transported in interstate or foreign commerce in the execution or concealment of a scheme or artifice to defraud that person or those persons of money or property having a value of \$5000 or more; or*
- c. *"Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or*
- d. *"Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's checks bearing a forged countersignature; or*
- e. *"Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof –*
- f. *"Shall be fined under this title or imprisoned not more than ten years, or both.*
- g. *"This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government. This section also shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of any bank note or bill issued by a bank or corporation of any foreign country which is intended by the laws or usage of such country to circulate as money."*

2. Title 18 U.S.C. §2314 – Generally. Congress enacted the National Stolen Property Act (hereinafter, “ITSP”) pursuant to its authority under the Commerce Clause. In general, its provisions prohibit: transporting goods known to be stolen, converted or fraudulently obtained across state lines or our national boundaries; inducing or causing people to travel, or transporting them, across state lines or our national boundaries in furtherance of a fraudulent scheme; and transporting forged securities and traveler's checks across state lines or our national boundaries. The statute converts what were once solely state and local crimes into federal violations, thereby supplementing and enhancing local law enforcement efforts by extending federal law enforcement jurisdiction.
3. Elements of Title 18 U.S.C. §2314. The statute is comprised of five distinct provisions which together proscribe activities involving the transportation of certain specified items and persons across state lines and in interstate commerce. Each such provision requires its own elements of proof and will be considered in order of appearance:
4. Paragraph One - The Elements:
 - a. Transportation in interstate or foreign commerce . . .
 - b. Of any goods, wares, merchandise, securities or money valued at \$5000 or more. . .
 - c. Knowing the same to have been stolen, converted or taken by fraud.
5. Paragraph One – Proving the Elements:
 - a. Interstate or Foreign Commerce. Generally, a prosecution for violation of ITSP will not lie unless the property or moneys obtained by theft or fraud have been transported or transferred across state lines or in foreign commerce. Transportation or transfer of such items within a single state does not satisfy the requirements of the statute. It is the transport or transfer of the stolen or fraudulently obtained property or moneys from one state to another or between the United States and a foreign country that violates the statute and confers federal jurisdiction over the crime. Thus, a thief who steals property in Georgia and then transports it to Florida commits a violation of ITSP. If instead he remains in Georgia with the proceeds of his theft, the suspect has violated state law, but not federal law.

- b. Transport, transfer or transmit. The means by which the stolen or fraudulently obtained property or money is transported, transferred or transmitted across state lines is not material. However, the funds/property transferred must be proceeds of the fraud or derived from the proceeds of the fraud. United States v. Poole, 557 F.2d 531 (5th Cir. 1977). The funds or property transferred must be directly traceable to the proceeds of the fraud or directly traceable to the property or funds derived from the proceeds of the fraud. Evidence of commingled proceeds in accounts is insufficient. United States v. Lazarenko, 546 F.3d 593 (9th Cir. 2008). It is sufficient that the defendant transported the item personally or *caused* the item to be transported, transferred or transmitted in interstate or foreign commerce. Pereira v. United States, 347 U.S. 1 (1954). Thus, reliance on a private or commercial courier, or use of the U.S. Mail, thereby causing the interstate transport of the stolen merchandise, satisfies this element of the statute. Furthermore, when an act is performed with knowledge the mail will be used in the ordinary course of business, or where such use can be reasonably foreseen, even though not actually intended, the person “causes” the mail to be used. Likewise, interstate wire transfers of funds obtained through theft or fraud constitute violations of ITSP. The courts have consistently held that ITSP can be charged concurrently with the Mail Fraud and Wire Fraud statutes because they demand proof of at least one different element. Accord Pereira at 9. With regard to foreign commerce, ITSP makes it a crime to transport to the United States goods stolen in a foreign country, even if they do not subsequently travel in interstate commerce once in country. United States v. Davis, 608 F.2d 555 (5th Cir. 1979). Further, property or moneys obtained by fraud or theft in the United States and then transported or transmitted overseas violate ITSP. The Second Circuit has held that stolen property transported to a restricted customs area by an exporter and placed in the possession of the shipping company was “in foreign commerce” though no borders had been crossed. United States v. Ajlouny, 629 F.2d 830 (2nd Cir. 1980), cert. denied, 449 U.S. 1111 (1981).

- c. Value of \$5000 or more. To sustain a conviction under ITSP, the government must prove the stolen or fraudulently obtained property transported in interstate or foreign commerce is valued at \$5000 or more. According to the legislative history of the statute, the purpose of this limitation is to avoid over-extending the resources of the federal government by leaving prosecutions of less substantial thefts and frauds to the states. In addressing the valuation element of ITSP, the courts refer initially to 18 U.S.C. § 2311, which defines "value" as "face, par, or market value, whichever is the greatest" For items with no face or par value, the courts have generally defined market value as "the price a willing buyer would pay a willing seller either at the time and the place that the property was stolen or at any time during the receipt or concealment of the property." United States v. Robinson, 687 F.2d 359, 360 (11th Cir. 1982); accord, United States v. Ruhe, 191 F.3d 376 (4th Cir. 1999). In applying this standard, the courts look to the particular facts of each case and pose the question: in what type of transaction would the person from whom the property was stolen have engaged? If the victim was a wholesale merchant, the value for purposes of ITSP is the wholesale market price; if the victim was a retail merchant, the value of the stolen property is the retail market price. Robinson at 360; United States v. Willette, 764 F.Supp. 759 (N.D.N.Y. 1991). Where there is no established market for the stolen item, courts have relied on the prices paid among those dealing in the stolen property, referring to this as the "thieves market". See, United States v. Berkitt, 619 F.2d 649, 658 (7th Cir. 1980). Finally, each interstate or foreign transport or transfer of an item valued at \$5000 or more can be charged as a separate count of ITSP.

- d. Aggregation. The definition of "value" set forth in 18 U.S.C. §2311 concludes with the statement: "... and the aggregate value of all goods, wares, and merchandise, securities and money referred to in a single indictment shall constitute the value thereof." In Schaffer v. United States, 362 U.S. 511 (1960), the Supreme Court considered whether individual shipments of stolen goods in interstate commerce valued at less than \$5000 could be aggregated to attain the jurisdictional minimum specified by ITSP. Relying on a "sensible reading of the statute" the Court affirmed the notion that "where the shipments have enough relationship so that they may properly be charged as a single offense, their value may be aggregated." Schaffer at 517. In Schaffer, the aggregated value was based on series of shipments to a particular defendant. Where the shipments were spread among more than one person, the Fourth Circuit aggregated the value of the individual shipments once the government proved they were part of a "common design" (i.e., single plan or agreement). Andrews v. United States, 108 F.2d 511 (4th Cir. 1939).
- e. Knowledge. To obtain a conviction under ITSP, the government must show that the defendant knew that the items he transported or caused to be transported in interstate or foreign commerce were stolen, embezzled, or obtained by fraud. The government is not required to prove that the defendant knew, foresaw, or intended that the stolen items were or would be transported in interstate or foreign commerce. The courts have generally held that the jury may infer that a person in possession of recently stolen property knew the property was stolen, unless such possession is satisfactorily explained. Barnes v. United States, 412 U.S. 837, 845 (1973); see also, United States v. Cowden, 545 F.2d 257 (1st Cir. 1976), cert. denied, 430 U.S. 909 (1977); United States v. McGregor, 529 F.2d 928 (9th Cir. 1976).

6. Paragraph Two – The Elements: The second paragraph of ITSP makes it a federal crime to cause potential victims (or the agent of the victim) of a fraudulent scheme to travel in interstate or foreign commerce to execute or conceal the scheme. This provision of the statute is referred to as prohibiting “travel fraud”. In its most basic application, a con artist who misleads his victim in a face-to-face encounter can still be charged with ITSP if the victim or the victim’s agent crossed state lines or traveled into or out of the United States to investigate or learn of the fraudulent offer and ultimately handed his money or property to the defendant. See, e.g., United States v. Steffen, 251 F.3d 1273 (9th Cir. 2001). The elements of this second paragraph are:
 - a. Transportation of or inducement of a person to travel in interstate or foreign commerce . . .
 - b. For the purpose of defrauding that person of money or property valued at \$5000 or more.
7. Paragraph Two – Proving the Elements:
 - a. Transport or induce to travel in interstate or foreign commerce. This element of ITSP is met if a potential or actual victim of a fraud scheme travels in interstate or foreign commerce in connection with the scheme. It is not necessary to prove the victim actually parted with their money or property; instead it is sufficient if the defendant induced them to travel in an effort to defraud them. Likewise, the government need not prove that the money or property lost by the victim to the defendant traveled in interstate or foreign commerce. United States v. Benson, 548 F.2d 42, 46 (2nd Cir. 1977). Thus, where a con artist induces his next door neighbor to travel out of state to view certain real estate parcels offered in a fraudulent scheme, he can be charged with ITSP whether or not the neighbor invests; further, he can be charged with ITSP based on the interstate travel of the neighbor even if the neighbor does not invest until he returns home and hands his funds to the con artist. (Of course, the U.S. Attorney’s decision whether or not to prosecute the case will generally rest on the amount of the *actual* loss suffered by the victims of the scheme).

- b. To Defraud of \$5000 or More. As with the Mail Fraud and Wire Fraud statutes, the government must prove the defendant's intent to defraud. See the prior discussion concerning that element under the Mail Fraud statute above. As to meeting the jurisdictional amount of \$5000 or more, see the discussion concerning the valuation element for Paragraph One above.
- c. Travel Fraud Cases. The following are examples of cases in which defendants have been charged with "travel fraud" under ITSP:
 - 1) United States v. Jacobson, 1993 U.S. App. LEXIS 22534 (4th Cir. Va. Sept. 3, 1993)(unpublished opinion), cert. denied, 511 U.S. 1069 (1994) (§2314 violated by doctor who induced out-of-state patients to travel to his Virginia clinic for fraudulent fertility treatments).
 - 2) United States v. Casperson, 773 F.2d 216 (8th Cir. 1985) (Travel fraud provision of ITSP violated through inducement of investors to travel across state lines in advance fee loan scheme).
 - 3) United States v. Biggs, 761 F.2d 184 (4th Cir. 1985) (Defendant committed travel fraud under ITSP by inducing Florida residents to visit coal mine in West Virginia for purposes of obtaining fraudulent investments).
- 8. Paragraph Three – The Elements: The third paragraph of ITSP prohibits the transportation of falsely made, forged, altered or counterfeited securities or tax stamps in interstate and foreign commerce. The government must prove the following elements:
 - a. Transport in interstate or foreign commerce . . .
 - b. Falsely made, forged, altered or counterfeited securities or tax stamps . . .
 - c. With unlawful or fraudulent intent . . .
 - d. Knowing the securities or tax stamps to be forged, altered or counterfeited.
- 9. Paragraph Three – Proving the Elements:

- a. Interstate or Foreign Commerce. See discussion above concerning this element under Paragraph One. In addition, as discussed below, this section of ITSP covers the negotiation of forged out-of-state checks. Thus, a defendant who makes payment with a falsely made or forged check drawn on an out-of-state bank can be charged with ITSP based on the subsequent interstate transfer of the check in the bank collection process. Pereira v. United States, 347 U.S. 1 (1954). Further, each act of transporting the subject securities in interstate or foreign commerce constitutes a single offense under ITSP. Thus, a defendant who transports several forged checks or securities at one time may be charged with only one count of ITSP. It is not the number of false securities, but rather the number of state lines crossed that determines the number of counts to be charged. United States v. Frierson, 2000 U.S. App. LEXIS 27939, (10th Cir. 2000) (unpublished opinion). Alternatively, the government may charge as separate counts of ITSP each negotiated check that enters interstate commerce to be processed through the banking system. See, e.g., United States v. Flick, 516 F.2d 489 (7th Cir.), cert. denied, 423 U.S. 931 (1975); United States v. White, 524 F.2d 1249 (5th Cir. 1975), cert. denied, 426 U.S. 922 (1976).
- b. Falsely made, forged, altered or counterfeited securities. The following have been deemed "securities" for purposes of the third paragraph of ITSP:
- 1) Checks – see citations above; also, see below, this paragraph of ITSP does not apply to **checks with forged endorsements**;
 - 2) Quit Claim Deeds – United States v. Speidel, 562 F.2d 1129 (8th Cir. 1977), cert. denied, 435 U.S. 915 (1978);
 - 3) Money orders – United States v. Weisser, 737 F.2d 729 (8th Cir. 1984), cert. denied, 469 U.S. 1158 (1985);
 - 4) Motor vehicle titles with fraudulent odometer readings. – Moskal v. United States, 498 U.S. 103 (1990);
 - 5) Stocks and bonds – United States v. Anderson, 532 F.2d 1218 (9th Cir.), cert. denied, 429 U.S. 839 (1976); United States v. Taylor, 802 F.2d 1108 (9th Cir. 1986), cert. denied, 479 U.S. 1094 (1987).

- 6) The courts have held that airline tickets, credit cards, credit card slips, and leases are not "securities" under ITSP. In addition, the final paragraph of Section §2314 states that the statute's provisions do not apply to counterfeit obligations and securities of the United States or any foreign government, nor falsely made or counterfeit foreign currency. (See Title 18 U.S.C. §8 for the statutory definition of "obligation or other security of the United States). The reason for this exclusion of United States obligations and securities from the provisions of ITSP lies in the fact that "trafficking in counterfeits, forgeries and spurious representations of [these instruments] is made criminal elsewhere in the United States Code by anti-counterfeiting statutes", such as Title 18 U.S.C. §471. United States v. Robie, 166 F.3d 444, 454 (2nd Cir. 1999). Finally, it should be noted that the language "falsely made, forged, altered or counterfeited securities" has been construed by the courts to not include **checks with forged endorsements**. See, e.g., United States v. Tyson, 690 F.2d 9 (1st Cir. 1982) (finding the forging of an endorsement on an otherwise valid security [here, a check] does not render the security falsely made, forged, altered, or counterfeited for purposes of paragraph three of ITSP). That language however, has been held to apply to checks signed by a maker using a fictitious name. United States v. Seay, 386 F.Supp. 550 (E.D. Ill. 1974), aff'd, 518 F.2d 646 (7th Cir.) (per curiam), cert. denied, 423 U.S. 995 (1975); checks drawn on an account opened with a fictitious name, United States v. Metcalf, 388 F.2d 440 (4th Cir. 1968); checks bearing a forged signature of an authorized signatory to the account. United States v. Fletcher, 444 F.2d 619 (10th Cir. 1971); checks drawn on closed accounts, United States v. Phillips, 869 F.2d 1361 (10th Cir. 1988), cert. denied, 490 U.S. 1069 (1989); and checks bearing the actual signature of a person not authorized to act as a signatory on the account, United States v. Fontana, 948 F.2d 796 (1st Cir. 1991). At least one court noted that a check with a forged endorsement would fall under the provisions of the first paragraph of ITSP prohibiting the interstate transport of property stolen, converted or taken by

fraud, provided the \$5000 valuation requirement was met. Tyson at 16.

- c. Fraudulent Intent. The government must establish that the defendant transported the forged or counterfeit check or security with unlawful or fraudulent intent. The requisite intent may be established through the defendant's own statements and/or his participation in the scheme to transport or negotiate the securities. See United States v. Sheridan, 329 U.S. 379 (1946) (requisite intent under predecessor to Section 2314 was met by proof that defendant cashed check drawn on out-of-state bank which he knew to be forged and which entered interstate commerce for collection); United States v. Frierson, 2000 U.S. App. LEXIS 27939 (10th Cir. 2000)(unpublished opinion) (statements to witness and on audiotape concerning defendant's knowledge and evidence of his participation in scheme established requisite intent).
 - d. Knowledge of Forgery or Counterfeit. To sustain a conviction under this paragraph of ITSP, the government must prove the defendant knew the security transported in interstate or foreign commerce was forged or counterfeited at the time of its transportation. See United States v. Resurreccion, 978 F.2d 759 (1st Cir. 1992) (defendant's knowledge that checks were counterfeit established in part by his statements to Customs agents indicating he hoped to obtain only 40% to 80% of the face value of certified checks drawn on a certain foreign bank)... It is not necessary to prove in the case of a forged security that the defendant forged the endorsement himself; the government need only show that he knew the instruments he cashed had been forged. United States v. Solomon, 422 F.2d 1110 (7th Cir.), cert. denied, 399 U.S. 911 (1970).
10. Paragraph Four – The Elements: In 1968, at the prodding of the travel industry, Congress amended ITSP to prohibit the transportation in interstate or foreign commerce of traveler's checks bearing forged countersignatures. The elements of this provision are:
- a. Transporting in interstate or foreign commerce . . .
 - b. Any traveler's check bearing a forged countersignature . . .
 - c. With unlawful or fraudulent intent.

11. Paragraph Four – Proving the Elements:
 - a. Interstate or Foreign Commerce. See above for prior discussions on this jurisdictional requirement.
 - b. Forged Traveler's Checks. Interstate transport of traveler's checks with forged countersignatures violates this provision of ITSP. Though the plain language of the statute suggests the traveler's check must be forged and then transported in interstate commerce, the courts have found this provision violated by defendants who stole the traveler's checks, transported them over state lines, and then forged them to negotiate them in the destination state. See United States v. Bates, 1999 U.S. App. LEXIS 221, (4th Cir. Va. Jan. 8, 1999) (unpublished opinion) (reversed on several counts for the purposes of sentencing issues only – the main principle of the case is good law) ; United States v. McGovern, 661 F.2d 27 (3rd Cir. 1981), cert. denied, 454 U.S. 1157 (1982).
 - c. Unlawful or Fraudulent Intent. This element has not spawned much discussion by the courts as it pertains to the traveler's check provision of ITSP. It appears the defendant's unlawful or fraudulent intent is inferred from his possession and/or his negotiation of the forged documents.
12. Paragraph Five – The Elements: The final paragraph of ITSP prohibits the interstate transport of any tool, implement or other items used to counterfeit, alter or falsely make any security or tax stamps. While there are few reported decisions construing the elements of this proviso, the plain language of this section suggests that items used to affix authorized signatures, impress official seals or certifications, or imprint face amounts to checks and other securities would be covered if transported in interstate or foreign commerce. One court held that the paper on which a partially completed security was printed did not constitute a tool or implement within the meaning of this paragraph of ITSP.
13. Venue for Violations of Title 18 U.S.C. §§1341, 1343 and 2314. Venue for violations of the Mail Fraud statute, Wire Fraud statute and ITSP is governed by Title 18 U.S.C. §3237, which provides in pertinent part: "Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, . . . may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves."

As a consequence of the foregoing, mail fraud cases may be brought in the district where the subject mail matter is placed in the mail stream, any district through which it travels, or the district in which it is received by the addressee; wire fraud cases may be brought in the districts from which the transmission was sent, through which it passed, and in which it was received; and ITSP may be charged in the districts from which the stolen items or victims originated, through which they traveled, and in which they completed their journey. As a practical matter, however, the stated policy of the Department of Justice is to bring charges under these three statutes at their beginning and ending points, rather than in the districts through which the mail, transmission, victims or property merely passed.

14. Miscellaneous information concerning Mail and Wire Fraud Statutes

- a. Mail Fraud, Wire Fraud and ITSP are qualifying racketeering acts under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), Title 18 U.S.C. §1961, United States v. Dischner, 974 F.2d 1502 (9th Cir. 1992), cert. denied, 507 U.S. 923 (1993).
- b. Under the Interstate Travel in Aid of Racketeering Act ("ITAR"), Title 18 U.S.C. §1952, it is unlawful to travel, use the mails, or use any facility in interstate or foreign commerce to promote gambling, untaxed liquor, drugs, prostitution, arson, bribery, or crimes of violence.
- c. Most importantly, all three statutes are "specified unlawful activities" for purposes of the Money Laundering statutes, Title 18 U.S.C. §§1956 and 1957. Thus, any use of the illegal proceeds obtained through violations of the Mail Fraud, Wire Fraud and ITSP statutes which furthers continuing violations or conceal those crimes can be charged under various sections of the Money Laundering statutes. The penalties for violations of Sections 1956 and 1957 under the Federal Sentencing Guidelines are substantial; consequently, these charges serve as valuable bargaining chips in negotiating plea agreements with defendants.

VII. THEFT

INSTRUCTORS NOTE

Check the TEACHING NOTES following the Enabling Performance Objective page at the beginning of this Lesson Plan to ensure you are aware of what is taught in conjunction with this block of material.

A. RAPPORT AND OPENING STATEMENT

1. Background:

- a. This material is taught in conjunction with EPO #11, Identify the elements of Title 18 U.S.C. §1001. For the false statements section of this course, the instructor should refer to EPO #11.
- b. Title 18 U.S.C. §641 makes it unlawful for anyone to commit a theft, embezzlement or conversion of property belonging to the United States. The statute reads:

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of \$1000, he shall be fined under this title or imprisoned not more than one year, or both.

- c. The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.
- d. *Under Title 18 U.S.C. §3571, the maximum fine for the felony offense is \$250,000, and the maximum fine for the misdemeanor is \$100,000.*

B. ENABLING PERFORMANCE OBJECTIVES (EPO)

EPO #24: Identify and apply the elements of Title 18 U.S.C. §641.

C. EPO #24: IDENTIFY AND APPLY THE ELEMENTS OF TITLE 18 U.S.C. §641

1. Title 18 U.S.C. §641 is a comprehensive statute designed to address four crimes which, at common law, were separate, but by this statute have been combined: Embezzlement, theft, conversion, and receiving stolen property. In each instance, for the offense to have federal jurisdiction, the item that is wrongfully appropriated must have in fact belonged to the United States. United States v. Tailan, 161 F.3d 591 (9th Cir. 1998). Each individual transaction in which government money is taken is a separate count, even if the the transaction is part of an overall scheme involving many transactions. United States v. Reagan, 596 F.3d 251 (5th Cir. 2010) Items stolen from a post or Navy exchange are government property. United States v. Towns, 842 F.2d 740 (4th Cir.), cert. denied, 487 U.S. 1240 (1988); Tailan, *supra*. Postage stamps that are manufactured under a government contract come within the terms of the statute. United States v. Robie, 166 F.3d 444, 452-453 (2nd Cir. 1999). There is no requirement that the government establish an actual loss of government property to establish a violation of the statute. United States v. Barnes, 761 F.2d 1026, (5th Cir. 1985)
 - a. As an example, suppose a government employee is issued a government-owned vehicle that is to be used only for official business. One weekend, while his private vehicle is being repaired, the employee uses the government vehicle to take his wife shopping and out to dinner. What is the crime? Conversion. Is there any intent to permanently deprive the government of the property? The answer is no; however, it was a wrongful use of property belonging to the United States.
 - b. Assume that instead of taking the government vehicle for a night out with his spouse, the same employee sells the car to a friend who knows that it is the employee's government vehicle and that the employee lacks the authority to sell the car. What are the crimes? In this situation, there is theft by the employee, and receipt of stolen property by the friend. When a person responsible for processing and depositing income tax payment checks takes one, properly endorses the check, but then transfers the money from the proper government account to her personal account, the crime is embezzlement.

2. Theft of government property is the wrongful appropriation of government property by a person who has no lawful right to such property. The elements of theft of government property are:
 - a. Defendant knowingly;
 - b. Takes, carries away, or converts to the use of another;
 - c. Something of value belonging to the United States, or made under a contract with the United States.
3. United States v. Forman, 180 F.3d 766 (6th Cir. 1999). It is not necessary that the defendant know the stolen item belongs to the United States; the prosecution need only prove that the defendant knew that he was taking something that did not belong to him, and that in fact, the item taken belongs to the United States. United States v. Crutchley, 502 F.2d 1195, 1201 (3rd Cir. 1974). In order to prove that an item belongs to the United States, the government must prove that it had "title to, possession of, or control over" the item. United States v. Tailan, 161 F.3d 591, 592 (9th Cir. 1998), quoting United States v. Long, 706 F.2d 1044, 1049 (9th Cir. 1983).
4. In the case of United States v. Robie, 166 F.3d 444 (2nd Cir. 1999), the items stolen were misprinted postage stamps manufactured by a private printer under a government contract. The court found that, due to the contract terms and the supervision that was maintained over all aspects of the printing process by the U.S. Postal Service, including maintaining strict control over all waste product, the stolen misprinted stamps were indeed property of the United States or any property made or being made under contract for the United States or any department or agency thereof, and thus the theft was properly charged under this statute.
5. Larceny by trick is an offense under the statute. All instances where an individual obtains a wrongful advantage from another's property. Morrisette v. United States, 342 U.S. 246 (1952); United States v. Crutchley, 502 F.2d 1195 (3rd Cir. 1974).

6. When the crime alleged is a felony, one additional element must be proven: the value of the stolen item exceeds \$1,000. In Robie, supra, the primary issue was whether stolen misprinted stamps, which were never issued and scheduled for destruction, had a value reaching the felony level. There was substantial evidence that Robie had been able to dispose of the misprinted Richard Nixon stamps for over \$20,000; however, the court said that the stamps could not be valued by the price that was obtained in a "thieves market" because the value had to be set on the date of the theft, not on the date of the sale of the item. In the end, the court determined that the jury was permitted to infer that the stolen stamps had a value greater than their combined face value of \$51.20, and that the jury's finding on this element was supported by the evidence. Id. at 449-452.
7. Following hurricane, Katrina, the defendant applied for and received Government funds to rebuild a home. However, the defendant did not own the property, and used the money for non-rebuilding expenditures. Her actions deprived the government of the funds economic value for aiding homeowners post Katrian rebuilding efforts. United State v.Dowl, 619 F.3d 494 (5th Cir. 2010).
8. Cutting and carrying away trees from a national forest consist of two separate offenses. Both 18 U.S.C. §1853 and 18 U.S.C. §641 serve two distinct public purposes. United States v. Gemmill, 535 F.2d 1145 (9th Cir.), cert. denied, 429 U.S. 982 (1976).
9. Where it is reasonable from the facts for a defendant to believe that the government has abandoned property, and the government cannot prove otherwise, a charge of theft of government property will fail. Morrisette v. United States, 342 U.S. 246 (1952).
10. **Embezzlement** is the fraudulent appropriation of property by a person to whom it has been entrusted, or into whose hands it has lawfully come. The original taking of the property is lawful, or done with the express or implied consent of the owner, but once the property is lawfully acquired, the defendant fraudulently applies the money or property to another, illegal use. The elements of embezzlement are:
 - a. The money or property belongs to the United States or an agency thereof;
 - b. The money or property came into the possession or care of the defendant lawfully;

- c. The defendant fraudulently appropriates the money or property to his/her own use or the use of others; and
 - d. The defendant does so knowingly and willfully with the intent to either temporarily or permanently deprive the United States of the use of the money or property so taken.
- 11. Note that with embezzlement, the original acquisition of the property or money is lawful; there is no fraud or scheme or crime committed in the original entrustment of the money or property. It is only after the entrustment occurs that the defendant begins the fraud. The defendant must be proven to know that the money or property does not belong to the defendant, and that knowing this fact, the defendant deliberately uses the item for his/her own purpose, either temporarily or permanently depriving the government of the use of the item. If the crime is alleged to be a felony, the government must also prove that the value of the property embezzled is over \$1,000.
- 12. **Criminal conversion** is the wrongful deprivation of goods or personal property belonging to another. It includes the unlawful assumption and exercise of the right of ownership over goods or personal property belonging to another, the alteration of their condition, or the exclusion of the owner's rights. The property can be converted either permanently or for an indefinite period of time. Conversion does not require an intent to keep the property, nor does it require a wrongful taking. Conversion may include misuse or abuse of property, as well as use in an unauthorized manner or to an unauthorized extent. **As set forth in United States v. Dowl, 619 F.3d 494 (5th Cir. 2010), the elements of conversion are:**
 - a. The money or property belonged to the government
 - b. The defendant appropriated the money or property to his own use or for that of another
 - c. The defendant acted knowingly and willfully with intent to either temporarily or permanently deprive the owner of the use of the money or property

13. Conversion of government property requires some act inconsistent with the government ownership rights in the property. The conversion may include some abuse or misuse of property, or use of government property in some unauthorized manner. Morrisette v. United States, 342 U.S. 246 (1952). There is no requirement that the defendant intend to keep the property or deprive the government of the property. There is also no requirement that the taking of the property be wrongful. If the value of the property is over \$1,000, the crime is a felony.
14. What acts do not qualify as conversions of government property? In United States v. Wilson, 636 F.2d 225 (8th Cir. 1980), Wilson used a government secretary to type personal work for him relating to a business he was establishing. Many weeks, almost 100% of the secretary's time was spent doing Wilson's personal work. Wilson told the secretary that she was not to allow his personal work to interfere with government work. No attempt was made to conceal what was happening. This all took place during a period when there was almost no government work to be done, due to a reorganization. On these facts, the court held that the government had not shown that Wilson possessed the intent required for a conviction under Title 18 U.S.C. §641, because he had not interfered with the rights of the government to the secretary's work.
15. **Receipt of stolen property** can be charged when a person knowingly receives or buys stolen property with intent to keep for his or her own use or gain (i.e., to sell for profit). In addition, the statute allows a person to be charged with receipt of stolen property when that person knowingly receives property that the person knows is stolen. The person receiving the stolen property does not need to know that the stolen property belongs to the United States, but only that the property is stolen. If the value of the property is over \$1,000, the crime is a felony.

VIII. FALSE CLAIMS

INSTRUCTOR NOTE

This EPO supports LGD Lesson Plan #1153 (Advanced Legal Issues).

~~FOR OFFICIAL USE ONLY~~

A. RAPPORT AND OPENING STATEMENT

False claim offenses are found throughout the federal government. Every agency faces a daunting task of protecting the public tax dollars against false, fictitious and fraudulent claims. From run of the mill low dollar temporary duty false claims to high technology false claims involving contracting, etc. the public tax dollars are being assaulted on a daily basis. The good message in this arena however, recognizes that although false claims against the government are rampant, they are easy to prosecute once uncovered.

B. ENABLING PERFORMANCE OBJECTIVE

C. EPO #25 IDENTIFY AND APPLY THE ELEMENTS OF RESENTING A FALSE, FICTITIOUS OR FRAUDULENT CLAIM

1. **Elements.** Title 18 U.S.C. §287 provides:

- a. Whoever
 - 1) makes or presents
 - 2) to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof,
 - 3) any [(material) **not all circuits require the claim to be material**] claim upon or against the United States, or any department or agency thereof,
 - 4) knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.
- b. If the claim pertains to a DOD contract, the maximum fine increases to \$1,000,000. (See 18 U.S.C. §3623).
- c. Objective of the Statute. The Congressional objective in enacting 18 U.S.C. §287 was to broadly protect funds and property of the government from fraudulent claims, regardless of the particular form or function of government instrumentality upon which such claims were made. Rainwater v. United States, 356 U.S. 590 (1958). ***The plain purpose of the statute is to assure the integrity of claims and vouchers submitted to the government.*** United States v. Maher, 582 F. 2d 842 (4th Cir. 1978), cert. denied 439 U.S. 1115 (1979.)

2. **Department / Agency.** The federal criminal code (18 U.S.C. §6) defines the terms “department” and “agency” as follows:
 - a. The term “department” means one of the executive departments enumerated in section 1 of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government.
 - b. The term “agency” includes any department, independent establishment, commission, administration, authority, board, or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.
3. **Claim.** Claim means a demand for money or transfer of public property. United States v. Tieger, 234 F.2d 589 (3rd Cir.), cert. denied, 352 U.S. 941 (1956).
4. **Knowledge.** Knowledge/actus reus/mens reus under 18 U.S.C. §§2 and 287.
 - a. Defendants need not have knowledge of specific prohibitions of the statute (every criminal has constitutional right to be stupid). Johnson v. United States, 284 F. Supp. 273 (W.D. Pa. 1968), affd. 410 F.2d 38 (8th Cir. 1968), cert. denied, 396 U.S. 822 (1969). Ignorance of the federal presence does not negate the requisite mens rea for a 18 U.S.C. §287 violation - intent to present a fraudulent claim. United States v. Montoya, 716 F.2d 1340, 1345 (10th Cir. 1983).

- b. The actus reus element of §287 requires the defendant present a claim to a "person or officer in the civil, military, or naval service of the United States," or a "department or agency" of the United States. The mens rea element of 18 U.S.C. §2 requires that the defendant, who presents a false claim to the government via an intermediary, must know the intermediary is presenting the false claim to someone. United States v. Gumbs, 283 F.3d 128 (3rd Cir. 2002) [Defendant was convicted for filing a false claim involving work performed for the Virgin Islands Government, which was paid for by a grant from the federal government; the claim was forwarded to the federal government for payment that was to be drawn on the "grant account"; the defendant was **unaware** that the claim was being forwarded for payment; (case reversed)]. Therefore, in order to be convicted of willfully causing an intermediary to present a false claim to a federal department under 18 U.S.C. §2, a defendant must at least know that he is causing the intermediary to present a false claim to someone, even if he does not know that the department to which he is causing the intermediary to present a false claim is in fact a federal department. United States v. Feola, 420 U.S. 671 (1975). A defendant who simply presents a false claim, without any knowledge that the entity to whom the false claim is presented will in turn present the false claim to a third party(federal government), cannot be said to have willfully caused the intermediary to commit the actus reus prohibited under 18 U.S.C. §2.
5. **Knowingly**. Knowingly filing a false claim implicitly means "intent to defraud." United States v. Catton, 89 F.3d 387 (7th Cir. 1996). Submitting a claim that the defendant knows to be false, fictitious, or fraudulent is what the statute protects against. United States v. Maher, 582 F.2d 842 (4th Cir. 1978), cert. denied 439 U.S. 1115 (1979).
6. **Materiality** (**NOTE: Circuits are not in agreement**). 18 U.S.C. §287, unlike other false claims or false statement provisions such as 18 U.S.C. §1001 does not expressly state that "materiality" is an element of the offense.

- a. Before 1997, the Fourth and Eighth Circuits **held that materiality is an element** of 18 U.S.C. §287. United States v. Pruitt, 702 F.2d 152, 155 (8th Cir. 1983) and United States v. Snider, 502 F.2d 645, 652 n.112 (4th Cir. 1974); whereas the Second, Fifth, Ninth, and Tenth Circuits **held that materiality is not an element** under 18 U.S.C. §287. United States v. Upton, 91 F.3d 677 (5th Cir. 1996); United States v. Taylor, 66 F.3d 254, 255 (9th Cir. 1995); United States v. Parsons, 967 F.2d 452, 455 (10th Cir. 1992); United States v. Elkin, 731 F.2d 1005, 1009 (2nd Cir.), cert. denied, 469 U.S. 822 (1984)(criticized / questioned in Belzerian V. United States, 127 F.3d 237 (2nd Cir. 1997)).
- b. The Eleventh Circuit explicitly avoided deciding whether materiality is an element under 18 U.S.C. §287. United States v. White, 27 F.3d 1531, 1535 (11th Cir. 1994).
- c. Because the statute expressly incorporates the term “fraudulent” in conjunction with the term “false”, the Committee (on 11th Circuit Jury Instructions) believes that materiality is an essential element of the offense that must be submitted to the jury pursuant to the decisions of United States v. Gaudin, 515 U.S. 506 (1999); United States v. Wells, 519 U.S. 482 (1997); and Neder v. United States, 527 U.S. 1 (1999). The Court concluded in Wells that materiality was not an element of the offense of making a false statement in violation of 18 U.S.C. §1014, but held in Neder that use of the words “fraud” or “fraudulently” as terms of art in 18 U.S.C. §§ 1341, 1343, and 1344 incorporated the common law requirement that proof of fraud necessitates proof of misrepresentation or concealment of a material fact. Gaudin held that when materiality is an essential element of an offense, it must be submitted to the jury.
- d. Presently the 5th Circuit recommends “materiality” be included as an element of the offense. The pattern jury instructions for materiality in the 5th Circuit state: A claim is “material” if it has a natural tendency to influence, or is capable of influencing, the agency to which it was addressed. It is not necessary to show, however, that the government agency was in fact deceived or misled.

- e. The 6th Circuit holds proof of materiality is not necessary, because the terms false, fictitious and fraudulent are connected with the “disjunctive or” and thus must be given separate meaning. United States v. Saybolt, 577 F.3d 195 (3rd Cir. 2009).

7. **Statutory Construction.**

- a. As a matter of statutory construction, 18 U.S.C. §1341 does not supplant 18 U.S.C. §§287 and 1001 insofar as fraudulent claims against the United States are concerned. United States v. LaBar, 521 F. Supp. 203 (M.D. Pa. 1981), cert. denied, 549 U.S. 945 (1982).
- b. 18 U.S.C. §§ 287, 1001(Material False Statements), 1341(Mail Fraud), and 1343 (Wire Fraud) are not mutually exclusive insofar as prosecution is concerned. United States v. Computer Sciences Corp. 689 F.2d 1181(4th Cir. 1982), cert. denied 459 U.S. 1105 (1983)(overruled in part on other grounds by Busby v. Crown Supply, 896 F.2d 833 (4th Cir. 1990) and overruled in part on other grounds as stated in Foster v. Wintergreen Real Estate Co., 2008 U.S. Dist. LEXIS 90466, affd. 363 Fed. Appx. 269 (4th Cir. Va. 2010)(unpublished opinion)...

8. **False Statement made in conjunction with a False Claim.**

- a. 18 U.S.C. §287 requires that a claim for money or property be presented to department or agency of the United States, upon or against the United States, whereas 18 U.S.C. §1001 requires only that a statement or representation, which need not involve money or property, be made within the jurisdiction of any department or agency of the United States. United States v. Johnson, 284 F. Supp. 273 (W.D. Mo. 1968), affd. 410 F. 2d 38 (8th Cir. 1968), cert. denied, 396 U.S. 822 (1969.) Thus, a defendant may be properly punished under 18 U.S.C. § 287 for making false claim against the United States and under 18 U.S.C. §1001 for making false statements in a matter within the jurisdiction of the United States Probation Office, even though he committed only one act of lying (lied about ownership of his Porsche during an interview to determine whether or not he qualified for court-appointed counsel). Each statute requires proof of acts which the other does not. United States v. Allen, 13 F.3d 105 (4th Cir. 1993).

- b. False statement of fact made in connection with claim and as basis for the claim constitutes a false claim within the meaning of 18 U.S.C. §287. Evans v. United States, 11 F.2d 37 (4th Cir. 1926). The statements must be false under any reasonable interpretation. United States v. Adler, 623 F.2d 1287 (8th Cir. 1980).
- 9. **Intent.** Fraudulent intent and knowledge are required as part of the offense. Imperial Meat Co. v. United States, 316 F.2d 435 (10th Cir. 1963). ***Intent to defraud the government is not an element of the offense.*** United States v. Milton, 602 F.2d 231 (9th Cir. 1979). Simply acting with knowledge that the claim was false, or fictitious, or fraudulent (i.e. with consciousness that it was wrong) is all that is required to assure the statutes purpose of protecting the integrity of the claims and vouchers submitted to the government. United States v. Maher, 582 F.2d 842 (4th Cir. 1978), cert. denied, 439 U.S. 1115 (1979)...
- 10. **Interaction with Title 42 Offenses.**
 - a. Physicians can be prosecuted under 18 U.S.C. §§287 and 1001 for making false statements on claims submitted under medicaid and medicare programs, rather than under specific provisions of 42 U.S.C. § 1395 (which covers medicare fraud). United States v. Adler, 623 F.2d 1287 (8th Cir. 1980).
 - b. By enacting 42 USC §408, Congress did not intend to pre-empt, supersede, or impliedly repeal 18 USC §287. United States v. Ruster, 712 F.2d 409 (9th Cir. 1983).
- 11. **Particular Claims.**
 - a. A tax preparer's act of submitting a tax return bearing a forged signature of a taxpayer, so the tax preparer could obtain the refund, constituted making a false claim. Kercher v. United States, 409 F.2d 814 (8th Cir. 1969)...
 - b. Valid claims for work performed pursuant to illegally obtained government contracts is an offense under the statute. United States v. Winchester, 407 F. Supp. 261 (D. Del. 1975).
 - c. Application for credit insurance under the Fair Housing Authority program is not a claim within the meaning of the statute. The application does not make a demand for money or for some transfer of public property. United States v. McNinch, 356 U.S. 595 (1958).

- d. One who presents vouchers for payment for ammunition that he had caused to be packed and accepted by the government knowing that the ammunition had not been inspected and accepted by the government inspectors as complying with the contract specifications is a false claim. United States v. United States Cartridge Co., 95 F.Supp. 384 (D. Mo. 1950), affd. 198 F.2d 456 (8th Cir. 1952), cert. denied, 345 U.S. 910 (1953).
 - e. Fraudulent representations made to post-office officials in order to receive second-class mailing permit, which allowed mailing of magazines at a lower rate than what would otherwise be proper, is a false claim. United States ex rel. Rodriguez v. Weekly Publications, Inc., 68 F. Supp. 767 (D. N.Y. 1946).
 - f. Submitting false claims for tax refunds in attempt to avoid paying income taxes is a violation of the statute. United States v. Drape, 668 F.2d 22 (1st Cir. 1982).
 - g. Internal revenue agent who presented fraudulent expense statements for approval by his superior, knowing that the superior's endorsement on the account presented to him was necessary before account would be paid, had presented a claim against the United States within the meaning of the statute. Kurzrok v. United States, 1 F.2d 209 (8th Cir. 1936).
12. **Defenses.** Good faith is a valid defense to "knowingly filing false", fictitious, or fraudulent claims." United States v. Nash, 175 F.3d 429 (6th Cir. 1999).

IX. FALSE IDENTIFICATION

A. RAPPORT AND OPENING STATEMENT

TEACHING NOTE

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1. What is the "Federal" interest in false identification? False Federal and state identification documents often act as initiating documents that enable individuals to commit Federal and state crimes. For example, a certified copy of the birth certificate of a deceased person is used as a "breeder document" to acquire a driver's license, social security card and other documents, thus providing evidence to support the creation of a new identity. False identification facilitates international terrorism, narcotics smuggling, illegal immigration, flight from justice, fraud against business and the government, and other criminal activity. Examples of this phenomenon include:
 - a. The 9/11 Hijackers. Some of the hijackers that flew the planes into the World Trade Center towers entered the United States with the help of false identification documents.
 - b. Drug Smuggling. Eighty percent (80%) of the hard drugs entering the U.S. are smuggled by rings using false identification.
 - c. Illegal Aliens. The tax burden caused by illegal aliens using false identification is estimated to be in excess of \$12 billion per year (45% of aliens applying for unemployment benefits possessed counterfeit U.S. residence cards).
 - d. Fugitives. A random survey of fugitives by the FBI found that all used false identification; some had more than 30 aliases.
 - e. Fraudulent Activities. False identification crimes cost American businesses over \$1 billion each year in check and credit card fraud, securities fraud, and embezzlement.

- f. **Passport Fraud.** Each year, approximately 30,000 submitted passport applications are fraudulent. Using a false birth certificate of a deceased person to procure a U.S. passport is aggravated identify theft. There is no requirement the government has to prove the defendant knew the identification used to obtain the passport belonged to a living person. The term person means both living and deceased. United States v. Maciel-Alcala, 598 F.3d 1239 (9th Cir. 2010).
 - g. **Counterfeiting.** Counterfeiters of currency are frequently in possession of counterfeit social security cards, driver's licenses, food stamp identification cards, and voter registration cards.
 - h. **Firearms Smugglers.** Firearms smugglers routinely use fraudulent driver's licenses to acquire firearms.
 - i. **Drug Couriers.** Drug couriers use false identification to avoid the reporting requirements of the Bank Secrecy Act.
2. **Assistance to States:** There are a variety of reasons the Federal government's interest in false identification crimes necessitates assistance to State governments.
- a. **Monetary Loss.** The Federal government loses substantial sums through benefit programs and matching funds due to false identification fraud.
 - b. **Source Documents.** State identification documents serve as source documents for the issuance of federal documents.
 - c. **Constitutional Power...**
 - 1) The Federal government is empowered to regulate activities, such as trafficking in false documents, implements, features, etc., **which appear to be issued under the authority of the United States. If their production, transfer, possession or use, involve state documents, jurisdiction is based on the items being in, or affecting, interstate or foreign commerce (to include via electronic means) or involve use of the mails. See 18 U.S.C. §1028 (c)(1), (c) (2), (c)(3)(A) &(c)(3)(B).**

- 2) The government need only prove a minimal nexus with interstate commerce under 18 USC §1028(a) to satisfy the “in or affects interstate or foreign commerce” requirement. A defendant need not actually affect interstate commerce. The defendant only needs the intent to accomplish acts that, if successful, would have affected interstate or foreign commerce. United States v. Berry, 583 F. Supp. 2d 749 (E.D. Va. 2008).
- d. Examples. The following examples illustrate some of the above mentioned concepts.
- e. United States v. Cole, 32 F.3d 16 (2nd Cir.), cert. denied, 531 U.S. 849 (1994). Attempted re-entry of a deported Jamaican posing as a Canadian citizen, who displayed Canadian birth certificate, a Canadian social-insurance card, and a Toronto Metro Pass, all bearing the name Joseph James, satisfied intent to defraud the United States...or...the production, transfer, or possession prohibited by this section is in or affects interstate or foreign commerce, or the identification document or false identification document, "... is transported in the mail in the course of the production, transfer, or possession prohibited by this section."
- f. United States v. Sutton, 13 F.3d 595 (2nd Cir. 1994): Sutton was employed as a State Motor Vehicle representative. She fraudulently processed State driver's licenses in return for cash bribes. The processed applications were sent from the Brooklyn DMV office to Albany, where the licenses were mailed out to the applicants mailing addresses (approx 159 applications were involved). The court noted that this section recognizes that the prohibited acts in Title 18 U.S.C. §1028 involve a continuing offense under Title 18 U.S.C. § 3237. Thus, Federal courts have venue in any district in which such an offense was begun, continued, or completed.

Reminder: Jurisdiction for state documents (production, possession, transfer, or use) is based on such documents being either involved in the use of the mails, or the documents are in or affected interstate or foreign commerce.

B. ENABLING PERFORMANCE OBJECTIVES (EPO)

- a. EPO #26: Identify and apply selected offenses under 18 U.S.C. §1028, the False Identification Crime Control Act of 1982.

- b. EPO#27: Identify the penalties that may be imposed pursuant to selected provisions of 18 U.S.C. §1028, the False Identification Crime Control Act of 1982.

C. EPO #26 IDENTIFY AND APPLY SELECTED OFFENSES UNDER 18 U.S.C. § 1028, THE FALSE IDENTIFICATION CRIME CONTROL ACT OF 1982

- 1. The Statute. Title 18 U.S.C. §1028 prohibits a number of different activities involving false identification documents. Specifically, subsection (a) of the statute lists a number of proscribed activities:
 - a. Whoever, in a circumstance described in subsection (c) of this section.
 - 1) knowingly and without lawful authority produces an identification document, authentication feature, or a false identification document;
 - 2) knowingly transfers an identification document, authentication feature, or a false identification document knowing that such document or feature was stolen or produced without lawful authority;

TEACHING NOTE

A 18 U.S.C. §1028(a)(2) violation (knowingly transferring identification documents, identification features, or false identification documents knowing said documents were stolen or produced without lawful authority) is committed during the Continuing Case Investigation's undercover buy.

Possessing less than 5 identification documents under 18 U.S.C. §1028(a)(3) is not a federal offense – possession of 5 or more with intent to use unlawfully or transfer unlawfully is a jurisdictional requirement.

18 U.S.C. §1028A

Aggravated Identity Theft

TEACHING NOTE: Although we do not teach 18 U.S.C. §1028A(a)(1), this information is being provided for background purposes.

Aggravated Identity Theft under 18 U.S.C. §1028A(a)(1). The government must prove the defendant knowingly possessed, transferred or used, (2) without lawful authority, (3) a means of identification of another person, (4) during and in relation to a predicate felony offense set forth in the statute. United States v. Abdelshafi, 592 F.3d 602 (4th Cir. 2010). The means of identification that was knowingly possessed, transferred or used must belong to a “real” person. Flores-Figueroa v. United States, 129 S. Ct. 1886 (U.S. 2009). The offense of aggravated identity theft carries a mandatory, 2 year sentence to run consecutively with any other term of imprisonment. United States v. Brack, 2011 U.S. App. LEXIS 13649 (4th Cir. N.C. July 5, 2011). However, when more than one count is charged that results in a conviction, the court in its discretion can allow the penalties to run concurrently.

- 3) knowingly possesses with intent to use unlawfully or transfer unlawfully five or more identification documents (other than those issued lawfully for the use of the possessor), authentication features, or false identification documents;
- 4) knowingly possesses an identification document (other than one issued lawfully for the use of the possessor), authentication feature, or a false identification document, with the intent such document or feature be used to defraud the United States;
- 5) knowingly produces, transfers, or possesses a document-making implement or authentication feature with the intent such document-making implement or authentication feature will be used in the production of a false identification document or another document-making implement or authentication feature which will be so used;
- 6) knowingly possesses an identification document or authentication feature that is or appears to be an identification document or authentication feature of the United States or a sponsoring entity of an event designated as a special event of national significance which is stolen or produced without lawful authority knowing that such document or feature was stolen or produced without such authority;

- 7) knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law; or
 - 8) knowingly traffics in false authentication features for use in false identification documents, document-making implements, or means of identification.”
- b. The 8 offenses listed in the statute vary in degrees of seriousness for purposes of punishment
- c. Examples. The following examples are used to illustrate various issues associated with a violation of the statute.
- 1) United States v. LaFaive, 618 F.3d 613 (7th Cir. 2010). Using false identification to assume the identity of a deceased sister, open checking accounts in her name, using counterfeit checks, and withdrawing nearly \$65,000 before being apprehended is an offense under 18 U.S.C. §1028(a)(1).
 - 2) United States v. Walton, 36 F.3d 32 (7th Cir. 1994). Walton was vendor of heart pacemakers, who began tampering with invoices and packing slips of pacemakers still in their shipping containers. Walton changed the "use before" dates on outdated pacemakers, re-labeled others with false make, model, serial numbers and dates, sold expired models for implantation, and implanted used models. Walton admitted to possessing an implement capable of creating new labels and also possessed an embossing tool that allowed him to forge the seal of the state of Indiana.
 - 3) United States v. Quinteros, 769 F.2d 968 (4th Cir. 1985). A Social security card is an identification document within meaning of Title 18 USCS § 1028. The definition of an identification card as found in the statute is neither vague nor overbroad. United States v. Kernell, 2009 U.S. Dist LEXIS 126625 (E.D. Tenn. Nov. 20, 2009).

- 4) United States v. Pahlavani, 802 F.2d 1505 (4th Cir. 1986). Form I-94, Department of Justice Arrival-Departure Record, is an identification document as defined in Title 18 U.S.C. §1028 since it is frequently used as such.
- 5) United States v. Gros, 824 F.2d 1487 (6th Cir. 1987). Six blank cards which contained no name or social security number and which had on them liberty bell which had never before appeared on social security cards were not "identification documents" under Title 18 U.S.C. §1028.
- 6) United States v. Coello, 899 F. Supp. 1240 (S.D.N.Y. 1995). In connection with government's preparation of presentence report for defendant who pleaded guilty to possession of false identification documents, laminates found in defendant's possession were not "identification documents," where laminates resembled Immigration and Naturalization Service (INS) temporary resident cards issued to agricultural workers, but did not contain internal card containing bearer's picture, name, date of birth, signature, fingerprint, and INS number, because although it was clear that purpose of laminates was to make counterfeit identification documents, they were not such documents without internal card.
- 7) United States v. Mendoza, 157 F. Supp. 2d 935 (N.D. Ill. 2001). Police officers had probable cause to arrest suspect for federal crime of fraud in connection with identification documents under Title 18 U.S.C. § 1028, where suspect admitted that identification he produced at officers' request was fake and that there were additional pieces of fake identification in his apartment.
- 8) United States v. Rohn, 964 F.2d 310 (4th Cir. 1992). It is an essential element of 18 USCS §1028(a)(3) that government affirmatively prove that defendant's intended use for the false identification documents must have violated particular federal, state, or local law; the government impermissibly attempted to shift burden of proof to appellant by suggesting that there were no possible lawful uses for phony identifications.

- 9) United States v. Jackson, 155 F.3d 942 (8th Cir.), cert. denied, 525 U.S. 1059 (1998). Defendant's possession of five stolen driver's licenses was sufficient to prove identification documents' effect on interstate commerce, even though only one of licenses was from out of state.
- 10) United States v. Della Rose, 278 F. Supp. 2d 928 (N.D. Ill. 2003). Defendant's motion for judgment of acquittal on federal conspiracy to produce false identification charge was granted because there was no evidence of any out-of-state involvement beyond plain fact that false identification was used to cash intra-state check at bank; Government failed to offer any positive proof of even minimal nexus between false identification document and interstate commerce.
- 11) United States v. Barajas-Montiel, 185 F.3d 947 (9th Cir. 1999), cert. denied, 531 U.S. 849 (2000). Evidence was insufficient to prove that defendant was in constructive possession of false identification documents found in vase on nightstand in her bedroom, where there was no evidence that bedroom was hers alone, none tying her to documents, and none that she knew documents existed or where they were kept.
- 12) United States v. Villareal, 253 F.3d 831 (5th Cir. 2001). Transfer of false identification document to undercover officer who had no intention of using it to travel across state or foreign lines or in any manner that would affect interstate or foreign commerce nevertheless satisfied jurisdictional element of Title 18 U.S.C. §1028(c)(3)(A), since, had defendant accomplished his intended goals, transfer would have been in or have affected interstate or foreign commerce.
- 13) United States v. Shi, 317 F.3d 715 (7th Cir. 2003). Seller and buyer of false identification documents appearing to be issued under authority of federal government did not compose "group" in sense relevant to conspiracy law and thus they could not be convicted of conspiracy pursuant to Title 28 U.S.C. § 1028(f).

- 14) United States v. Rashwan, 328 F.3d 160 (4th Cir.), cert. denied, 540 U.S. 922 (2003). Defendant, who used false address in order to obtain state identification card, learner's permit, and driver's license, did not have to "produce" documents in order to be convicted under Title 18 U.S.C. §1028(a)(1); defendant aided and abetted production of false documents within meaning of Title 18 U.S.C. §2(b), and it was not necessary for government to specifically charge defendant under §2(b) in order for defendant to be convicted as aider and abettor.
- 15) United States v. Koubriti, 199 F. Supp. 2d 656 (E.D. Mich. 2002). Protective sweep which federal agents conducted after they entered residence looking for someone who was on FBI's watch list was lawful, and district court denied defendants' motion to suppress false documents discovered while residence was being searched as well as statements which one of defendants made about those documents.

2. Definitions. In order to fully understand application of the statute, a number of definitions must be reviewed.
 - a. Document-Making Implement. The term, "document-making implement" means any implement, impression, template, computer file, computer disc, electronic device, or computer hardware or software, that is specifically configured or primarily used for making an identification document, a false identification document, or another document-making implement.
 - b. Identification Document. "Identification document" means a document made or issued by or under the authority of the United States Government, a state, political subdivision of a state, a sponsoring entity of an event designated as a special event of national significance, a foreign government, political subdivision of a foreign government, an international governmental or an international quasi-governmental organization which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals.

- 1) **Social Security Cards.** Social Security cards are identifications documents within the meaning of Title 18 U.S.C. §1028. United States v. Quinteros, 769 F.2d 968 (4th Cir. 1985).
 - 2) **Blank Documents.** However, six blank cards which contained no name or social security number and which had on them a liberty bell which had never before appeared on social security cards were not "identification documents" under the Title 18 U.S.C. §1028. United States v. Gros, 824 F.2d 1487 (6th Cir. 1987).
 - 3) **Mere Laminates.** In like fashion, mere "laminates" were held not to be identification documents within the meaning of the law, where they did not contain a critical identification feature, such as, an internal card containing the bearer's picture and other identifiers United States v. Coello, 899 F. Supp. 1240 (S.D.N.Y. 1995).
- c. **False Authentication Feature.** An authentication feature that is genuine in origin, but, without the authorization of the issuing authority, has been tampered with or altered for purposes of deceit; is genuine, but has been distributed, or is intended for distribution, without the authorization of the issuing authority and not in connection with at lawfully made identification document, documentation making implement, or means of identification to which such authentication feature is intended to be affixed or embedded by the respective issuing authority; or appears to be genuine, but is not, is a false authentication feature.
 - d. **Produce.** The term "produce," includes alter, authenticate, or assemble.
 - e. **Personal Identification Card.** The term "personal identification card" means an identification document issued by a State or local government solely for the purpose of identification
 - f. **State.** The term "state" includes any State of the United States, the District of Columbia, The Commonwealth of Puerto Rico, and any other commonwealth, possession or territory of the United States.

- g. Knowingly. The term “knowingly” means a knowing state of mind, with an awareness of the nature of one's conduct, and an awareness of or a firm belief in the existence of a relevant circumstance such as whether an identification document had been stolen before it was transferred. Knowingly means acting with knowledge of the facts. It does not include acts resulting from inadvertence, mistake or accident.
- h. Intent. With the intent - same culpable state of mind as the term “purposes.” The distinction from a knowing state of mind restated by Justice Rehnquist, “A person who causes a particular result is said to act purposefully, if, “he consciously desires that result, whatever, the likelihood of that result happening from his conduct,” which he is said to act knowingly if he is aware, that result is practically certain to follow from his conduct, whatever his desire may be as to that result.” United States v. United States Gypsum Co., 438 U.S. 422 (1978).
- i. Authentication Feature. The term “authentication feature” means any hologram, watermark, certification, symbol, code, image, sequence of numbers or letters, or other feature that either individually or in combination with another feature is used by the issuing authority on an identification document, document-making implement, or means of identification to determine if the document is counterfeit, altered, or otherwise falsified.
 - 1) United States v. Rohn, 964 F.2d 310 (4th Cir. 1992). An essential element in proving Title 18 U.S.C. §1028 (a)(3), where a defendant “knowingly possesses with intent to use unlawfully or transfer unlawfully five or more identification documents ...or false identification documents..., is the fact that the defendant intended to use these documents to violate a particular federal, state, or local law. .
 - 2) United States v. McCormick, 72 F.3d 1404 (9th Cir. 1995). For a violation of Title 18 U.S.C. §1028(a)(4), the federal government need not affirmatively prove that defendant intended to violate a particular federal, state, or local crime. The mere fact that defendant intended to use the documents to defraud the United States is essential in itself to prove the crime.

- 3) United States v Klopff, 423 F3d 1228 (11th Cir. 2005). Defendant obtained identifying information of individuals and used such information to obtain fraudulent driver's licenses and open credit card accounts in individuals' names permitting an inference the defendant intended to use a driver's licenses to misrepresent defendant's identity in conjunction with fraudulent credit cards. This evidence established defendant's unlawful purpose in possessing the licenses and credit cards (intent to defraud). The interstate financial transactions regarding the credit cards supplied a sufficient nexus to interstate commerce to establish jurisdiction..
 - 4) United States v Hamdi, 432 F3d 115 (2nd Cir. 2005). Defendant's production of false identification documents in violation of 18 USCS §§ 1028(a)(1) and 1028(c)(3)(A) qualified as a crime involving moral turpitude which would bar admission under Immigration and Naturalization Act (INA) § 212(a)(2)(A)(i)(I), 8 USCS § 1182(a)(2)(A)(i)(I), but that ground of inadmissibility may be waived under § 212(d)(3) of INA, 8 USCS § 1182(d)(3)(A).
- j. Traffic. The term traffic means to transport, transfer, or otherwise dispose of, to another, as consideration for anything of value; or to make or obtain control of with intent to so transport, transfer, or otherwise dispose of.

D. EPO#27: IDENTIFY THE PENALTIES THAT MAY BE IMPOSED PURSUANT TO SELECTED PROVISIONS OF 18 U.S.C. §1028, THE FALSE IDENTIFICATION CONTROL ACT OF 1982.

1. Penalties. The penalties for violation of Title 18 U.S.C. § 1028 are summarized as follows:
 - a. The punishment for an offense under this section is –
 - 1) except as provided in paragraphs (3) and (4) as set out under EPO # 1 above, is a fine under this title or imprisonment for not more than 15 years, or both, if the offense is --
 - a) the production or transfer of an identification document, authentication feature, or false identification document that is or appears to be

- (1) an identification document or authentication feature issued by or under the authority of the United States; or
 - (2) a birth certificate, or a driver's license or personal identification card;
 - b) the production or transfer of more than five identification documents, authentication features, or false identification documents;
 - c) an offense under paragraph (5) as set out under EPO #1 above; or
 - d) an offense under paragraph (7) as set out under EPO #1 above that involves the transfer, possession, or use of 1 or more means of identification if, as a result of the offense, any individual committing the offense obtains anything of value aggregating \$ 1,000 or more during any 1-year period.
- b. Except as provided in paragraphs (3) and (4) as set out under EPO #1 above, a fine under this title or imprisonment for not more than 5 years, or both, if the offense is --
- 1) any other production, transfer, or use of a means of identification, an identification document, authentication features, or a false identification document;
 - 2) or an offense under paragraph (3) or (7) as set out under EPO #1 above.
- c. A fine under this title or imprisonment for not more than 20 years, or both, if the offense is committed—
- 1) to facilitate a drug trafficking crime (as defined in section 929(a)(2) [18 USCS §929(a)(2)]); or
 - 2) in connection with a crime of violence (as defined in section 924(c)(3) [18 USCS §924(c)(3)]); or
 - 3) after a prior conviction under this section becomes final.

- d. A fine under this title or imprisonment for not more than 30 years, or both, if the offense is committed to facilitate an act of domestic terrorism [as defined under section 2331(5) of this title [18 USCS §2331(5)] or an act of international terrorism [as defined in section 2331(1) of this title (18 USCS § 2331(1))].
- e. In the case of any offense under subsection (a), forfeiture to the United States of any personal property used or intended to be used to commit the offense; and
A fine under this title or imprisonment for not more than one year, or both, in any other case. See United States v. Martinez-Cano, 6 F.3d 1400 (9th Cir. 1993) and United States v. Buenrostro-Torres, 24 F.3d 1173 (9th Cir. 1994) for discussion of how Sentencing Guidelines impact multiple document/implement case.

NOTE: Attempts to commit any and all of the above criminal offenses are also criminal violations.....

- 2. Federal Government Activity. Pursuant to 18 U.S.C. §1028(e), the statute does not prohibit "any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States, ... or any activity authorized under chapter 224 of this title from using such documents, features or implements." (Title 18 U.S.C. §§ 3521 et seq).
- 3. Transferring identification documents, authentication features, and false identification documents knowing that they are stolen or produced without lawful authority, as well as possessing five or more of these types of documents with the intent to use unlawfully or transfer unlawfully are typical offenses.
- 4. Jurisdiction is based on either:
 - a. US Government Identification. Possessing or using United States government documents, features, implements, etc., or
 - b. State identification:
 - 1) Possessing/transferring of such documents, features, implements, etc (state documents) which are either in, or affect, interstate or foreign commerce, or

- 2) Using the mails that involve the production, transfer, possession or use of such documents, features, implements, etc. (state documents).

X. DRUG OFFENSES

A. RAPPORT AND OPENING STATEMENT

A general understanding of drug offenses goes a long way in professional development of new investigators. Drugs are endemic in our society and can be found in every level of our social order - in the office, at home, and on the streets. Having a solid understanding of the elements of drug offense statutes and how they can be proved will ease the transition from the classroom to the streets.

B. ENABLING PERFORMANCE OBJECTIVES

A. EPO #28: Identify and apply the elements of 21 U.S.C. §844.

B. EPO #29: Identify and apply the elements of 21 U.S.C. §841.

C. EPO #28: IDENTIFY AND APPLY THE ELEMENTS OF 21 U.S.C. §844

1. Background. Due to pervasive substance abuse in our society, it is imperative that law enforcement officers have a working knowledge of controlled substance offenses. At various times during their career, law enforcement officers, regardless of agency assignment, are likely to face a variety of controlled substance offenses.
2. General. The United States government criminalizes possession and distribution (transfer) of controlled substances. These substances would be legal to possess and distribute (transfer), but for the statutes which "control" them. Alcohol and tobacco are not listed as controlled substances under federal law. **Alcohol and tobacco are not controlled substances – yet!**

3. Controlled Substance Defined. A controlled substance is defined by federal statute as a “drug or other substance...” identified in schedules I, II, III, IV, and V of Part B of (21 U.S.C. §812). Schedule I substances are considered the most dangerous, as they have no currently accepted medical use and have a very high potential for abuse. The remaining schedules list drugs based on their accepted medical use and their potential for abuse. The schedules list drugs by their scientific names. They also list finished drugs like cocaine, and the raw material, such as cocoa leaves, from which it is created. Controlled substance analogs are substances which have substantially similar chemical structures to controlled substances. Analogs are criminalized, as well are immediate precursor chemicals which are necessary compounds used to create the drugs. When charging these offenses, these substances must be listed in one of the five schedules and must be proven beyond a reasonable doubt.
4. Knowing Possession. Title 21 U.S.C. §844 makes it “unlawful for any person knowingly or intentionally to possess a controlled substance...” unless such substance was obtained directly from a medical practitioner pursuant to a valid prescription or as otherwise authorized by law. Knowingly means that a person realizes what he is doing and is aware of the nature of the conduct and does not act through ignorance, mistake, or accident. A person’s words, acts, or omissions can be used to determine if they acted “knowingly. Mere presence at the scene of a controlled substance offense is not, by itself, sufficient evidence to convict a defendant. United States v. Di Re, 332 U.S. 581 (1948); United States v. Valenzuela, 596 F. 2d 824 (9th Cir.), cert. denied, 441 U.S. 965 (1979). See also United States v. Leonard, 138 F.3d 906 (11th Cir. 1994). In most cases involving the crime of being a felon in possession of a firearm (drugs as well), dominion, control, and knowledge may be inferred where a defendant has exclusive possession of the premises. But this inference may be rebutted if other evidence contradicts it. However, if a suspect has a suspicion a crime was being committed and shut his eyes for fear of what he may learn, a jury may conclude the suspect had sufficient knowledge to establish culpability. United States v. Rodriguez, 929 F.2d 1224 (7th Cir. 1991); United States v. Garcia, 580 F.3d 528 (7th Cir. 2009).

- a. Possession. Possession is the ability to control the substance. United States v. Adams, 625 F.3d 371 (7th Cir. 2010). Knowing possession means that the person has knowledge of the nature of the substance that is being controlled. United States v. Gonzalez-Rodriguez, 621 F.3d 354 (5th Cir. 2010), cert. denied, 2011 U.S. LEXIS 1508. When a defendant does not own the vehicle in which drugs are found in a hidden container, proof that the defendant was aware of the presence of the drugs is required. United States v. Aponte, 619 F.3d 799 (8th Cir. 2010). It is not necessary that the person knows the exact nature of the substance (that it is cocaine for example). United States v. Davis, 501 F. 2d 1344 (9th Cir. 1974). It is sufficient the person knows it is a controlled substance; United States v. Morales, 577 F.2d 769 (2nd Cir. 1978); United States v. Fragoso, 978 F. 2d 896 (5th Cir.1992), cert. denied, 502 U.S. 1012 (1993).

TEACHING NOTE: In October 2009, the Department of Justice announced that it would no longer prosecute patients who legally obtain marijuana for medical purposes from licensed dispensaries in states that allow marijuana for medicinal use.

Furthermore, those who legally dispense marijuana through state licensed facilities will not be prosecuted. Per the Attorney General, the federal government will focus its resources on large scale illegal traffickers vice end users of the controlled substance.

TEACHING NOTE: Effective 1 March 2011, five synthetic cannabinoids creating compounds used to manufacture the drug commonly known as "SPICE" (and like substances) have been temporarily listed on the controlled substance list (Schedule I) by the DEA to avoid an imminent threat to public safety. See 21 CFR part 1308.

- 1) Actual / Constructive Possession. Possession of a controlled substance can be actual or constructive possession. Actual possession occurs when the substance is physically controlled by the person (in their hand for example). Constructive possession occurs when the person is not in actual physical contact with the substance, but has the power and intention to exercise dominion and control over it. The controlled substance is in the trunk of their car, on their dresser, or in their desk drawer. Knowledge of presence plus control is required. United States v. Dooley, 580 F.3d 682 (8th Cir. 2009)(this is a firearms case but the principle remains the same – proving 'knowledge of presence' of the prohibited item is essential for a conviction)....

- a) To establish constructive possession, the government is required to prove the occupant of a car had knowledge and dominion or control over the contraband itself or dominion and control over the car in which the contraband is found. United States v. Flores, 362 F.3d 1030 (8th Cir. 2004). The holder of the key be it to the dwelling, vehicle or motel room in question, has constructive possession of the contents therein. United States v. Timlick, 481 F.3d 1080 (8th Cir. 2007) (2nd, 3rd, 5th, 7th, and DC circuits are in accord). In most cases, dominion, control, and knowledge may be inferred where a defendant has exclusive possession of the premises. However, this inference may be rebutted. United States v. Rawlings, 341 F.3d 657 (7th Cir. 2003).
 - b) When drugs are hidden in secret compartments, guilty knowledge may not be inferred solely from control of the vehicle. Generally, at a minimum some circumstantial evidence that is suspicious in nature is necessary to establish guilty knowledge. United States v. Gonzalez-Rodriguez, 621 F.3d 354 (5th Cir. 2010), cert. denied, 2011 U.S. LEXIS 1508.
- b. Joint Possession. Joint possession occurs when more than one person possesses the same controlled substance. For example, if two people knowingly transport cocaine in the trunk of a car, they jointly possess the cocaine through constructive possession and both are criminally liable for the controlled substance in the trunk of the car. United States v. Flemming, 17 Fed. Appx. 414 (7th Cir. Ind. 2001) (unpublished opinion).

- c. Amount. Any amount of a controlled substance is sufficient to support a conviction. A trace amount of cocaine, a marijuana seed, residue on a roach clip, or a dried solution on a syringe are all that is needed to support a conviction under 21 U.S.C. § 844. The amount and type of the controlled substance to include the statutes used to charge the offense will have a direct impact on the sentence, but not the conviction itself. The amount of the controlled substance is an element of the offense and must be proven beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466 (2000).

TEACHING NOTE: The Fair Sentencing Act of 2010 has curtailed to some extent the sentencing disparity involving the possession of crack cocaine vs. cocaine in powder form. Previously, possession of 5 grams of crack cocaine triggered a mandatory minimum of 5 years imprisonment, whereas it took 500 grams of powdered cocaine to trigger the same sentence. The 100:1 sentencing disparity for crack (as compared to powdered cocaine) is now reduced to 18:1. This legislation eliminates the mandatory minimum sentence for possession of crack cocaine. It appears now that the simple possession of crack cocaine is a misdemeanor unless there are prior drug convictions.

D. EPO #29: IDENTIFY AND APPLY THE ELEMENTS OF 21 U.S.C. §841

1. Distribution... Title 21 U.S.C. §841(a) makes it unlawful for any person to knowingly or intentionally: "(1) manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance..." Possession with intent to manufacture, distribute, or dispense is usually proved through circumstantial evidence. Words, acts, omissions, packaging materials, method of packaging, scales, quantity, purity, presence of cash, distribution paraphernalia and transportation arrangements can all be used to prove the possession with intent to distribute. United States v. Ortiz, 445 F. 2d 1100 (10th Cir.) (as to quantity), cert. denied, 404 U.S. 993 (1971). There is no requirement for a commercial transaction. What is necessary is proving the knowing distribution (transfer) or possession with intent to distribute (transfer) the controlled substance. Medical doctors registered to distribute controlled substances are criminally liable for distribution when they prescribe controlled substances outside 'the course of professional practice.' United States v. Jong Hi Bek, 493 F. 3d 790 (7th Cir.), cert. denied, 552 U.S. 1010 (2007).

NOTE: The standard elements of unlawful and knowing possession apply to both statutes (§§844 and 841) (unlawful, knowing or intentional possession).

2. Penalties. Penalties for drug offenses depend upon the amount and type of drug involved (which schedule is affected) and the actual offense charged.
3. Possession of a listed chemical. 21 U.S.C. §841 (c). Offenses involving listed chemicals. Any person who knowingly or intentionally—
 - a. possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this title;
 - 1) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this title; or
 - 2) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 310 [21 USCS §830], or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required; shall be fined in accordance with title 18, United States Code, or imprisoned not more than 20 years in the case of a violation of paragraph 1) or 2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph 1) or 2) involving a list I chemical, or both. *The effect of this statute is to make it a crime to possess listed chemicals or precursor chemicals which are necessary for the manufacturing of a controlled substance.*
4. Possession of drug making equipment. 21 U.S.C. §843(a)(6). Possessing equipment to manufacture drugs is an offense when the government can prove knowledge that the person knew or had reasonable cause to believe the equipment will be used to manufacture a controlled substance. U.S. v. Chubbuck, 32 F. 3d 1458 (10th Cir. 1994)(as to possessing a triple neck round bottom flask); See also United States v. Roberge, 565 F.3d 1005, 1009 (6th Cir. 2009)(finding possession of jars containing bi-layered liquid, iodine tincture, Coleman fuel cans, muriatic acid, and plastic tubing supported charge of possessing equipment to manufacture methamphetamine).

5. Communication facility (communication device). 21 U.S.C. §843(b). It is a felony to knowingly or intentionally use a communication facility in causing or facilitating a controlled substance offense. Act of making arrangements for narcotics transaction on telephone constitutes proscribed use of communication facility regardless of who initiates the call (for a felony). United States v. Rodriguez-Ramirez, 777 F.2d 454 (9th Cir. 1985). However, using a telephone **to make misdemeanor drug purchase does not facilitate felony drug distribution violation of 21 U.S.C. § 843(b)**. Abuelhawa v. United States, 129 S. Ct. 2102 (U.S. 2009). Communication facilities are defined as any public/private instruments used or useful in the transmission of writing, signs, signals, pictures, or sounds, of all kinds to include mail, telephone, wire, radio, and all other means of communication. Each use is a separate offense.
6. Endangering human life while manufacturing a controlled substance. 21 U.S.C. §858. Creating a substantial risk of harm to the public endangers human life. U.S. v. Mock, 85 Fed. Appx. 619 (9th Cir. Wash. 2004)(unpublished opinion) (meth lab in an apartment that caught fire); U.S. v. Hagan, 412 F. 3d 887(8th Cir. 2005), cert. denied, 546 U.S. 1115 (2006) (meth lab in a van that was highly explosive created a substantial risk of harm). Defendant's manufacture of methamphetamine created substantial risk of harm to third persons; at least one person was present in defendant's playground. United States v. Allen, 297 F.3d 790, (8th Cir. 2002).
7. Distribution to persons under 21 years of age. 21 U.S.C. §859. Anyone at least 18 years of age who distributes controlled substances to anyone under 21 years of age is subject to enhanced punishment. Distribution of heroin generally carries a maximum sentence of 20 years in prison under 21 USC §841(b)(1)(C), however, provisions of 21 USC §859(a) **double all applicable penalties for persons over the age of 18 who distribute narcotics to persons under the age of 21, making defendant's maximum sentence of 40 years** – 12 years more than his ultimate sentence of 336 months – and thus rendering inapplicable the rule in Appendi v. New Jersey, 530 U.S. 466 (2000). A defendant has no valid Appendi claim where his ultimate sentence is less than which would have been authorized by a jury's verdict. United States v. Pressler, 256 F. 3d 144 (3rd Cir.), cert. denied, 534 U.S. 1013 (2001).

8. Distribution of controlled substances near protected locations. 21 U.S.C. §860. Distribution, possession with intent to distribute, and manufacturing controlled substances within 1000 feet of real property comprising a elementary, vocational, or secondary school or college or university or playground or public housing authority facilities or within 100 feet of a youth center, public swimming pool or video arcade are separate offenses for which the punishment is enhanced. Proving distribution of controlled substances within 1000 feet of a playground in violation of 21 U.S.C. § 860(e)(1) requires proving a playground is an outdoor facility, intended for recreation, open to the public, that includes three or more separate apparatus intended for the recreation of children. U.S. v. Alvarez, 451 F.3d 320 (5th Cir. 2006). **21 USC §860(a) applies to anyone who possesses a controlled substance within one thousand feet of a school with the intent to distribute that controlled substance anywhere.** United States v. Martin, 544 F. 3d 456 (7th Cir. 2008). For second offenders, the maximum punishment is life imprisonment.
9. Employing persons under 18 years of age in drug operations. 21 U.S.C. §861. It is unlawful for a person at least 18 years of age to knowingly and intentionally employ, use, induce, or coerce a person under the age of 18 to violate controlled substance statutes. It is a separate offense under the statute and not merely one of sentence enhancement and does not require proof by the government that the defendant knew that person in defendant's employ was under age. United States v. Valencia-Roldan, 893 F.2d 1080 (9th Cir.), cert. denied, 496 U.S. 435 (1990). The punishment doubles for first time offenders and triples for second time offenders. **NOTE: it is also an offense under this statute to knowingly distribute a controlled substance to an individual who is pregnant. See 21 U.S.C. §861(f).**

10. Criminal Forfeitures. 21 U.S.C §853. A controlled substance felony conviction can result in forfeiture of any property constituting proceeds, or derived from any proceeds obtained directly or indirectly as a result of the controlled substance offense. **This includes forfeiture of property used or intended to be used in any manner to commit or facilitate the offense.** Defendant's use of portion of his 40 acre parcel of property to cultivate marijuana rendered the entire parcel of property subject to forfeiture under 21 USC §853, where §853 requires forfeiture of any property used, or intended to be used, in any manner or part in the operation. United States v. Littlefield, 821 F.2d 1365 (9th Cir. 1987). Forfeiture of 27 quarter-horses was proper where defendant's horse breeding business was used as a cover for drug trafficking activities. United States v. Rivera, 884 F. 2d 544, (11th Cir. 1989), cert. denied, 494 U.S. 1018 (1990).
11. Maintaining drug-involved premises. 21 U.S.C. §856. It is an offense to knowingly open, lease, rent, use, or maintain any location (permanently or temporarily) for the purpose of manufacturing, distributing, or using controlled substances. This includes managing or controlling a location as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use the location for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.
12. Denial of Federal Benefits to drug traffickers and possessors. 21 U.S.C. §862. Federal and state drug distribution convictions can result in the loss of Federal benefits (within the courts discretion to impose). The statute distinguishes between distribution and possession of controlled substances in determining what benefits are lost and the extent of their loss.
13. Denial of assistance and benefits for certain drug-related convictions. 21 U.S.C §862(a). A federal or state felony conviction which has an element of the offense that includes possession, use, or distribution of a controlled substance precludes eligibility (or some aspects of) for assistance under State programs funded under the Social Security Act or Food Stamp Act.
14. Conspiracy / attempt to manufacture, distribute or possess with the intent to distribute. 21 U.S.C. §846. This section makes it an offense to attempt or conspire to violate controlled substance offenses.

- a. A conspiracy under this title does not require proof of an overt act. U.S. v. Covos, 872 F. 2d 805 (8th Cir.), cert. denied, 493 US 840 (1989); U.S. v. Shabani, 513 U.S.10 (1994). However, the proof must establish the defendant conspired to possess with the intent to distribute some controlled substance. Segura v. United States, 2009 U.S. Dist. LEXIS 50795 (W.D. Tex. May 7, 2009). A drug purchaser does not enter into a conspiracy with his supplier by reselling the purchased drugs to his own customers. A drug conspiracy requires evidence the buyer and seller entered into an agreement to commit a crime other than the crime that consists of the sale itself. United States v. Johnson, 592 F.3d 749 (7th Cir. 2010).
- b. Title 21 U.S.C. §841(a)(1), in conjunction with §846, makes it unlawful for any person to conspire to possess with the intent to distribute a controlled substance, such as cocaine. By driving a drug dealer to a meeting to acquire drugs, the defendant's minor role in assisting in the possession of drugs, which he knew would probably be distributed at a later time is all that is needed for the offense of conspiracy. United States v. Heras, 609 F.3d 101 (2nd Cir. 2010). Section 841(a)(1) does not apply to possession outside United States territory unless the possessor intends to distribute the contraband within the United States. There can be no violation of §846 if the object of the conspiracy is not a violation of §841. Thus, when the object of the conspiracy is to possess controlled substances outside the United States or possess controlled substances outside the United States with the intent to distribute them outside the United States, there is no violation of § 841(a)(1) or § 846 (conspirators in the US conspired to possess controlled substances outside the US); it is not a federal offense to conspire to possess/distribute controlled substances outside the United States. United States v. Lopez-Vanegas, 493 F. 3d 1305 (11th Cir. 2007).

15. **Sentencing guidelines.** Sentencing guidelines control the ultimate penalty assessed. The amount of drugs must be both pled and proved to invoke specific sentencing guidelines. Title 21 U.S.C. §841(b)(1)(A) of the Controlled Substances Act doubles the mandatory minimum sentence for certain federal drug crimes if the defendant was previously convicted of a “felony drug offense.” “Felony drug offense” in that section is defined exclusively by 21 U.S.C. §802(44). A state drug offense punishable by more than one year qualifies as a “felony drug offense” even if state law classifies the offense as a misdemeanor. Burgess v. United States, 553 U.S. 124 (2008).

TEACHING NOTE FOR CITP/UPT/LMPT CLASSES: This class may afford the instructor the time and opportunity to reinforce elements of drug offenses by using these offenses to explain/draft criminal complaint charges on the boards in class. This will underscore the importance of investigating / proving elements of crimes (controlled substance offenses) and reinforcing concepts learned in Federal Criminal law classes. It will also lay stronger conceptual foundations for subsequent Criminal Complaint exercises PREPARED BY STUDENTS. It is a smart/simple/innocuous way to introduce students to identifying elements of the offense, drafting criminal complaints using those elements, and highlighting the importance of establishing and incorporating those facts into an affidavit supporting the elements of the offense / facts of the case.

XI. SUMMARY

A. REVIEW OF PERFORMANCE OBJECTIVES

1. Identify and apply the elements of a criminal statute.
2. Distinguish between a felony and a misdemeanor...
3. Identify and apply the Assimilative Crimes Act and distinguish between exclusive, concurrent, and proprietary jurisdiction...
4. Identify and apply the elements of Title 18 U.S.C. §111.
5. Identify and apply the elements of Title 18 U.S.C. §201.
6. Identify categories of individuals prohibited from possessing firearms.
7. Identify and apply procedures to initiate a firearms trace through the Bureau of Alcohol, Tobacco, & Firearms.
8. Identify the weapons listed in Title 18 U.S.C. §922(a)(4) that require registration with the Bureau of Alcohol, Tobacco, & Firearms and those weapons prohibited on a federal facility.

9. Identify when an inducement by the government is permitted or prohibited.
10. Identify when predisposition negates an apparent entrapment defense.
11. Identify and apply the elements of Title 18 U.S.C. §1001.
12. Identify how many persons are needed to form a conspiracy.
13. Identify when knowledge and intent are sufficient to constitute a conspiracy.
14. Identify an agreement and its functions according to the provisions of Title 18 U.S.C. §371.
15. Identify the function of an overt act in the crime of conspiracy.
16. Identify when a co-conspirator's statement may be used during the prosecution of a conspiracy. [Not currently taught in any program]
[Instructor background material]
17. Identify the limits of the withdrawer's or late joiner's criminal liability.
18. Identify when a person may be prosecuted for assisting another in the commission of a crime, in accordance with Title 18 U.S.C. §§2-4.
19. Identify conduct that can be prosecuted under Title 18 U.S.C. §§1503 and 1510.
20. Identify the groups of persons who are protected under Title 18 U.S.C. §§1512 and 1513.
21. Identify conduct that constitutes "tampering," in violation of Title 18 U.S.C. §1512 and conduct that constitutes "retaliation" in violation of Title 18 U.S.C. § 1513.
22. Identify and apply the elements of the Mail Fraud statute, Title 18 U.S.C. §1341 and the Wire Fraud Statute, Title 18 U.S.C. §1343.
23. Identify and apply the elements of the National Stolen Property Act, Title 18 U.S.C. § 2314.
24. Identify and apply the elements of Title 18 U.S.C. §641.
25. Identify and apply the elements of presenting a false, fictitious or fraudulent claim.
26. Identify and apply selected offenses under 18 U.S.C. §1028, the False Identification Crime Control Act of 1982.

- 27. Identify the penalties that may be imposed pursuant to selected provisions of 18 U.S.C. §1028, the False Identification Crime Control Act of 1982.
- 28. Identify and apply the elements of 21 U.S.C. §844.
- 29. Identify and apply the elements of 21 U.S.C. §841.

B. REVIEW OF TEACHING POINTS

At the end of each criminal law session, review the key teaching points for that session.

XII. APPLICATION

A. LABORATORY

NONE

B. PRACTICAL EXERCISE:

NONE

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United States v. Bucey, 876 F.2d 1297(7th Cir.), cert. denied, 493 U.S. 1004 (1989)
United States v. Carlo, 507 F.3d 799 (2nd Cir. 2007)
United States v. Cowden, 545 F.2d 257 (1st Cir. 1976), cert. denied, 430 U.S. 909 (1977)
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United States v. Ghilarducci, 480 F.3d 542 (7th Cir.), cert. denied 2007 U.S. LEXIS 10281 (2007)

United States v. Jacobson, 1993 U.S. App. LEXIS 22534 (4th Cir. Va. Sept. 3, 1993) (unpublished opinion), cert. denied, 511 U.S. 1069 (1994)

United States v. Lane, 474 U.S. 438 (1986)

United States v. Lazarenko, 546 F.3d 593 (9th Cir. 2008)

United States v. Lindemann, 85 F.3d 1232 (7th Cir. 1996), cert. denied, 519 U.S. 966 (1996)

United States v. McAuliffe, 490 F.3d 526 (6th Cir.), cert. denied 2007 U.S. LEXIS 11620 (2007)

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United States v. Resurreccion, 978 F.2d 759 (1st Cir. 1992)

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United States v. Seay, 386 F. Supp. 550 (E.D. Ill. 1974), aff'd, 518 F.2d 646 (7th Cir.)(per curiam), cert. denied, 423 U.S. 995 (1975)
United States v. Sheridan, 329 U.S. 379 (1946)
United States v. Solomon, 422 F.2d 1110 (7th Cir.), cert. denied, 399 U.S. 911 (1970)
United States v. Speidel, 562 F.2d 1129 (8th Cir. 1977), cert. denied, 435 U.S. 915 (1978)
United States v. Steffen, 251 F.3d 1273 (9th Cir. 2001)
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Foster v. Wintergreen Real Estate Co., 2008 US Dist LEXIS 90466 (W.D. Va. Nov. 6, 2008), affd. 363 Fed. Appx. 269 (4th Cir. Va. 2010)
Imperial Meat Co. v. United States, 316 F.2d 435 (10th Cir. 1963)
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United States v. Catton, 89 F.3d 387 (7th Cir. 1996)
United States v. Computer Sciences Corp., 689 F.2d 1181(4th Cir. 1982), cert. denied, 459 U.S. 1105 (1983)
United States v. Drape, 668 F.2d 22 (1st Cir. 1982)
United States v. Elkin, 731 F.2d 1005 (2nd Cir.), cert. denied, 469 U.S. 822 (1984)
United States v. Feola, 420 U.S. 671 (1975)
United States v. Gaudin, 515 U.S. 506 (1999)
United States v. Gumbs, 283 F.3d 128 (3rd Cir. 2002)
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United States v. Garcia, 580 F.3d 528 (7th Cir. 2009)

United States v. Gonzalez-Rodriguez, 621 F.3d 354 (5th Cir. 2010), cert. denied, 2011 U.S. LEXIS 1508

United States v. Hagan, 412 F. 3d 887 (8th Cir. 2005), cert. denied, 546 U.S. 1115

United States v. Heras, 609 F.3d 101 (2nd Cir. 2010)

United States v. Johnson, 592 F.3d 749 (7th Cir. 2010).

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United States v. Pressler, 256 F.3d 144 (3rd Cir.), cert. denied, 534 U.S. 1013 (2001)
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United States v. Rodriguez, 929 F.2d 1224 (7th Cir. 1991).
United States v. Rodriguez-Ramirez, 777 F.2d 454 (9th Cir. 1985)
United States v. Shabani, 513 U.S. 10 (1994)
United States v. Timlick, 481 F.3d 1080 (8th Cir. 2007)
United States v. Valencia-Roldan, 893 F.2d 1080 (9th Cir. 1990), cert. denied, 496 U.S. 435 (1990)
United States v. Valenzuela, 596 F.2d 824 (9th Cir.), cert. denied, 441 U.S. 965 (1979)

ATTACHMENT A

INDIAN COUNTRY JURISDICTION

Draper v. United States, 164 U.S. 240 (1896)
Duro v. Reina, 495 U.S. 676 (1990)
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)
United States v. McBratney, 104 U.S. 621 (1881)
United States v. Wheeler, 435 U.S. 313 (1978)

TEST ITEM CONTROL SHEET (TICS)

COURSE NUMBER: 1091.....

COURSE

TITLE: Federal criminal law

Instructions: If a course is taught in sessions, put the EXAM number (E01, E02, E03, etc...) that the EPO will be tested on in the EDT. If all EPO's are tested on one exam, place an X in each box instead of the exam number. Using the test item numbers EAD has provided, complete the table below. Every EPO tested by multiple choice exam must be represented in each set with **one** test item. If an EPO is tested by PE or not tested at all put PE or NA in that corresponding EPO row in the program box. A TICS and EDT is required for all courses tested at all FLETC locations. Use more than one form if necessary.

Exam Distribution Table (EDT)

EPO	Set A	Set B	Set C	Set D	Set E	CITP	ICE_D	LMPT	UPTP
1.	I02891	I02899	I05254	I05154	I03086	E01	E02	E05	E05
2.	I02895	I02897	I06477	I06478	I06479	E01	E02	E05	E05
3.	I00742	I06480	I06481	I06482	I06483	E01	E02	E05	E05
4.	I02999	I06484	I06485	I06486	I06487	E01	E02	E05	E05
5.	I03000	I01235	I01237	I01233	I06488	E01	E02	E05	E05
6.	I01330	I01335	I01336	I06227	I06489	E01	E02	E05	E05
7.	I01331	I01337	I02270	I06228	I06490	E01	E02	E05	E05
8.	I03443	I03444	I03432	I05715	I05716	E01	E02	E05	E05
9.	I02204	I02208	I05261	I05262	I06491	E03	E02	NA	NA
10.	I02203	I02205	I02206	I02207	I05260	E03	E02	NA	NA
11.	I02193	I02192	I02191	I06492	I06493	E03	E02	E05	E05
12.	I07049	I01780	I01765	I05243	I06494	E03	NA	NA	NA
13.	I07575	I01779	I01776	I01775	I01761	E03	NA	NA	NA
14.	I01755	I01771	I07050	I05543	I01772	E03	NA	NA	NA

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15.	I01756	I01764	I05245	I05244	I01763	E03	NA	NA	NA
16.	I01754	I05247	I01760	I05246	I06495	NA	NA	NA	NA
17.	I07048	I01757	I01777	I06496	I06497	E03	NA	NA	NA
18.	I01788	I01791	I05454	I01795	I01790	E03	NA	E05	E05
19.	I02941	I02946	I05319	I06498	I06499	E03	NA	NA	NA
20.	I02949	I05320	I05408	I05409	I05410	E03	NA	NA	NA
21.	I05411	I05412	I05413	I05321	I02947	E03	NA	NA	NA
22.	I02195	I02196	I01784	I06500	I06501	E05	NA	NA	NA
23.	I06502	I06503	I06504	I06505	I06506	E05	NA	NA	NA
24.	I02137	I02138	I02139	I06507	I06508	E03	NA	E05	E05
25.	TBD	TBD	TBD	TBD	TBD				
26.	I19713	I19715	I19717	I19719	I19721	E03	NA	NA	NA
27.	I19714	I19716	I19718	I19720	I19722	E03	NA	NA	NA
28.	I19703	I19705	I19707	I19709	I19711	E02	E01	E03	E04
29.	I19704	I19706	I19708	I19710	I19712	E02	E01	E03	E04
EPO	Set A	Set B	Set C	Set D	Set E	CITP	ICE_D	LMPT	UPTP

NOTE: EPO #25 was created for IAITP which was a pilot program. It is not presently being used or tested. If there is a decision to test the material, the test questions are already written and will simply have to be assigned TICs numbers and inputted into the lesson plan TICs chart.

IPOTP: This program is taught and tested in Cheltenham, Md.

Implementation Instructions for EAD (if necessary):

Program Name	Date for item implementation	Use in all classes after class #	Special Instructions

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ATTACHMENT A

GENERAL GUIDE TO CRIMINAL JURISDICTION IN INDIAN COUNTRY

Jurisdiction: Jurisdiction can be defined as the power or authority of a court over a particular person, area, or subject matter.

Criminal Jurisdiction: In a criminal case, jurisdiction is the power or authority of the court to try and to punish the accused for any violation of a government's penal (or criminal) code.

How Does a Criminal Action Differ from a Civil Action: Criminal actions generally differ from civil actions in at least two important ways. First, the government itself generally brings criminal actions to protect the public interest or the community as a whole whereas civil actions are generally brought by one private party against another private party. Second, the available sanctions in a criminal action include imprisonment whereas imprisonment is not available as a remedy in civil actions (except for the court's contempt power). It is important to note, however, that these distinctions between criminal and civil actions have been developed from Anglo-American law and did not necessarily exist in traditional Native justice systems.

What is Indian Country: The definition of Indian Country is set forth by federal law (18 U.S.C. § 1151) as follows:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Tribal, Federal, and State Jurisdiction
Tribal Criminal Jurisdiction

General Scope of Criminal Jurisdiction In Indian Country*

Type of Crime

	"Major" Crime (as defined by Major Crime Acts)	All Other Crimes
Indian perpetrator, Indian victim	Federal (under Major Crimes Act) & Tribal jurisdiction	Tribal jurisdiction
Indian perpetrator, Non-Indian victim	Federal (under Major Crimes Act) & Tribal jurisdiction	Federal (under General Crimes Act) & Tribal jurisdiction
Non-Indian perpetrator, Indian victim	Federal (under General Crimes Act) jurisdiction	Federal (under General Crimes Act) jurisdiction
Non-Indian perpetrator, Non-Indian victim	State jurisdiction	State jurisdiction

* Please note that this general criminal jurisdiction chart does not apply to jurisdiction where Public Law 280, 18 U.S.C. 1162, or other relevant federal statutes, have conferred jurisdiction upon the state.

For a much more detailed Indian Country criminal jurisdiction chart - please see the official Jurisdictional Summary Chart from the U.S. Department of Justice, United States Attorneys Manual, Title 9, Criminal Resource Manual.

Inherent Sovereign Authority: Indian tribes - as sovereign nations - historically have inherent jurisdictional power over everything occurring within their territory. Tribal courts are courts of general jurisdiction which continue to have broad criminal jurisdiction. Any analysis of tribal criminal jurisdiction should begin with this sovereign authority and determine whether there has been any way in which this broad sovereign authority had been reduced (see below).

Federal or State Concurrent Jurisdiction: Congress has granted limited jurisdictional authority to the federal courts (under the General Crimes Act and the Major Crimes Act) and to state courts (under Public Law 280). It is important, however, to note that tribal courts maintain concurrent (or joint) criminal jurisdiction.

Criminal Jurisdiction over Non-Indians: Tribal courts no longer have criminal jurisdiction over non-Indians, unless Congress delegates such power to them. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

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Criminal Jurisdiction over Non-Member Indians: The Supreme Court ruled that tribal courts did not have criminal jurisdiction over non-member Indians. Duro v. Reina, 495 U.S. 676 (1990). Congress, however, overturned this decision and restored tribal court criminal jurisdiction over non-member Indians by adding the following language to the definition of “powers of self-government” in the Indian Civil Rights Act (25 U.S.C. § 1301) - “means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians” (Public Law 102-137).

Sentencing Limitation: The Indian Civil Rights Act ((25 U.S.C. § 1301 (Definitions); § 1302 (Constitutional rights); § 1303 (Habeas corpus)) provides that tribal courts cannot “impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year or a fine of \$5,000 or both.”

Charging Defendant in both Federal and Tribal Court is NOT a violation of Double Jeopardy: The U.S. Supreme Court has held that the source of the power to punish offenders is an inherent part of tribal sovereignty and not a grant of federal power. Consequently, when two prosecutions are by separate sovereigns, (e.g. the Navajo Nation and the United States), the subsequent federal prosecution does not violate the defendant’s right against double jeopardy. United States v. Wheeler, 435 U.S. 313 (1978).

FEDERAL CRIMINAL JURISDICTION

Federal courts are courts of limited jurisdiction (that is, they cannot hear all cases - there must be specific constitutional or statutory authority in order to bring a case in federal court). Congress has granted criminal jurisdiction in Indian country to the federal courts in certain circumstances, including the following:

General Crimes Act (18 U.S.C. § 1152): This federal statute (enacted in 1817 and set forth below) provides that the federal courts have jurisdiction over interracial crimes committed in Indian country as set forth below:

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except in the District of Columbia, shall extend to the Indian Country. This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian Country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Major Crimes Act (18 U.S.C. § 1153): The Major Crimes Act (enacted following the U.S. Supreme Court’s 1883 Ex Parte Crow Dog decision) provides for federal criminal jurisdiction over seven major crimes when committed by Indians in Indian country. Over time, the original seven offenses have been increased to sixteen offenses currently.

STATE CRIMINAL JURISDICTION

The states generally do not have jurisdiction over crimes occurring in Indian Country with three

exceptions set forth below:

Public Law 280 (18 U.S.C. § 1162): Congress in 1953 authorized states to exercise jurisdiction over offenses by or against Indians. Public Law 280 provided for broad state concurrent criminal jurisdiction on those states and reservations impacted by Public law 280 (both mandatory states and those states which opted to assume PL280 jurisdiction).

Other Federal Acts conferring State Jurisdiction: Some tribes have been affected by federal legislation in which states have received a federal mandate to exercise jurisdiction outside of Public Law 280, e.g., through state-wide enactments, restoration acts, or land claims settlement acts.

Non-Indian v. Non-Indian Crimes: The U.S. Supreme Court ruled in United States v. McBratney, 104 U.S. 621 (1881), and Draper v. United States, 164 U.S. 240 (1896), that state courts have jurisdiction to punish wholly non-Indian crimes in Indian country.

CRIMINAL ACTIONS MAY NEED TO BE TREATED AS CIVIL ACTIONS IN CERTAIN CIRCUMSTANCES

Please note that actions which might be treated as a criminal action in federal or state court may need to be treated as civil actions in tribal courts. This may be due to many factors, including legal jurisdictional limitations (such as the lack of tribal jurisdiction over non-Indians), practical jurisdictional limitations (such as Public Law 280), and resource limitations. Consequently, victims of crime in Indian Country and their advocates may need to research victims' rights in civil procedures to a much greater extent than would be needed in federal and state courts.

See the following website for more extensive information.

Tribal Court Clearinghouse

<http://www.tribal-institute.org/lists/jurisdiction.htm>

***Information in this Attachment was obtained directly from the Tribal Court Clearinghouse**

U.S. DEPARTMENT OF HOMELAND SECURITY
FEDERAL LAW ENFORCEMENT TRAINING CENTER
OFFICE OF MISSION SUPPORT
LEGAL DIVISION



Homeland Security

LESSON PLAN

FEDERAL CRIMINAL LAW

1091

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Revised by: (Jun/06)

(b)(6),(b)(7)(C)

Senior Instructor

Legal Division

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Senior Instructor

Legal Division

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Senior Instructor

Legal Division

Revised by: (AUG/10)

(b)(6),(b)(7)(C)

Attorney-Advisors

Legal Division

LESSON PLAN UPDATE NOTE: The TPO/EPO language has been revised to ensure it comports with the teaching/testing process (there is no actual change regarding the way the material is presented or tested). A new EPO (false claims) has been added to support the IAITP training program set forth in lesson plan 1153.

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RISK ASSESSMENT

Risk Assessment: This instruction is delivered in a classroom, typically in Buildings 216, 210, 212, or 261-3. Risk of injury to instructors and students is low. Primary risks are fires, explosions and other dangers requiring that you evacuate the classroom and building.

Recommended evacuation procedures:

1. Before beginning class, mentally note the nearest building exit.
2. If an alarm sounds, take the following steps:
 - a. Designate [by seat position and pointing] one student at each table to be the "squad leader." Tell the squad leaders to account for the people at their table after the group reaches the assembly area and report the results to you. Tell everyone else to stay close to their squad leader.
 - b. Direct all students to follow you and take them out the nearest building exit.
 - c. Take them to an assembly area sufficiently far from the building so that you do not interfere with evacuation or emergency response. Keep your group out of the roads and exits around the building.
 - d. Remind the squad leaders to account for their people and report to you.
3. If no alarm sounds, but you hear an explosion, smell smoke, etc., take the following steps:
 - a. If the need to evacuate is not apparent, send a student out each room door to find out what is happening. Tell them to return within two minutes and, if they find the room empty, to leave the building by the nearest exit, find you and tell you they're back.
 - b. If necessary, initiate the evacuation procedures noted in the preceding paragraph.
 - c. Report the situation to security personnel by using the following numbers: 2-911; 912-267-2461; or 912-267-2462.

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SYLLABUS

COURSE TITLE: FEDERAL CRIMINAL LAW

COURSE NUMBER: 1091

COURSE DATE: AUG/10

LENGTH OF PRESENTATION:

	LECTURE	LAB	P.E.	TOTAL	PROGRAM
A	13:00*			13:00*	CITP *(includes 1hr CBT-THEFT)
B	2:00			2:00	FWSR_LESB, NCIS_CTTTP
C	6:00			6:00	LMPT, UPTP, A_FAMTP
D	2:00			2:00	ICITP
E	1:00			1:00	USFS_DETP
F	6:00			6:00	IPOTP
G	6:00			6:00	ICE-D
H	4:00			4:00	FWSL_WIBS
I	8:00			8:00	A_BPOTP, A_BIA_BPOBTP

INFORMATION NOTE:

IAITP: INTERNAL AFFAIRS INVESTIGATION TRAINING PROGRAM IS SUPPORTED BY ADVANCED LEGAL ISSUES LESSON PLAN 1153.

DESCRIPTION:

Through lecture and discussion, this course provides the student with an introduction to criminal law and selected Federal offenses. This course is actually a series of independently taught sessions. These course sessions may be taught by different instructors, so it is imperative that all objectives are covered during the time scheduled.

This Lesson Plan covers material provided to many different programs for federal officers. Because of this, the EPOs are outlined below with a designation as to which EPOs are to be taught in each course. A generalized outline of course sessions has also been provided for the benefit of the instructor. These should be used only as a general guide. The EPO list should be referred to in determining precisely what material to teach to a specific student group. Instructors will be best served if they treat this Lesson Plan as an encyclopedia of several different courses, the course sessions as a rough guide, and the EPO list as the definitive list of material to cover in a particular course.

TERMINAL PERFORMANCE OBJECTIVE (TPO):

Given a set of facts depicting possible federal criminal offenses, the student will identify if a crime is properly alleged and if so, determine if all the elements of the crime are present that will allow a federal prosecution in accordance with applicable Federal statutes and case law.

ENABLING PERFORMANCE OBJECTIVES (EPO):

Master EPO	EPO	Numbers indicate the session(s) in which the EPO is taught.								
Introduction to Criminal Law / Assault / Bribery (2 hours)		A	B	C	D	E	F	G	H	I
1	Identify and apply the elements of a criminal statute.	1	X	1	X		1	1	1	X
2	Distinguish between a felony and a misdemeanor.	1	X	1			1	1	1	X
3	Identify and apply the Assimilative Crimes Act and distinguish between exclusive, concurrent, and proprietary jurisdiction.	1	X	1			1	1	1	X
4	Identify and apply the elements of Title 18 U.S.C. § 111.	1	X	1	X		1	1	1	X
5	Identify and apply the elements of Title 18 U.S.C. § 201.	1	X	1			1	1	1	X
Federal Firearms Violations (2 hours)		A	B	C	D	E	F	G	H	I
6	Identify categories of individuals prohibited from possessing firearms.	2		2		X	2	2		X
7	Identify and apply procedures to initiate a firearms trace through the Bureau of Alcohol, Tobacco, & Firearms.	2		2		X	2	2		X
8	Identify the weapons listed in Title 18 U.S.C. § 922(a)(4) that require registration with the Bureau of Alcohol, Tobacco, & Firearms and those weapons prohibited on a federal facility.	2		2		X	2	2		X
Entrapment (SEE TEACHING NOTE AT <u>END</u> OF CHART)		A	B	C	D	E	F	G	H	I
9	Identify when an inducement by the government is permitted or prohibited.	3						3		
10	Identify when predisposition negates an apparent entrapment defense.	3						3		
False Statements (SEE TEACHING NOTE AT <u>END</u> OF CHART)		A	B	C	D	E	F	G	H	I

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11	Identify and apply the elements of Title 18 U.S.C. § 1001.	3		3	X		3	3	2	
Conspiracy (4 hours) Taught to CITP in conjunction with Parties		A	B	C	D	E	F	G	H	I
12	Identify how many persons are needed to form a conspiracy.	4/5								X
13	Identify when knowledge and intent are sufficient to constitute a conspiracy.	4/5								X
14	Identify an agreement and its functions according to the provisions of Title 18 U.S.C. § 371.	4/5								X
15	Identify the function of an overt act in the crime of conspiracy...	4/5								X
16	Identify when a co-conspirator's statement may be used during the prosecution of a conspiracy. [Not currently taught in any program] [Instructor background material]									
17	Identify the limits of the withdrawer's or late joiner's criminal liability.	4/5								X
Parties (1 hour included with conspiracy in Option A; included in Theft / False Statements with Option C) (SEE TEACHING NOTE AT END OF CHART) Taught to CITP in conjunction with Conspiracy		A	B	C	D	E	F	G	H	I
18	Identify when a person may be prosecuted for assisting another in the commission of a crime, in accordance with Title 18 U.S.C. §§ 2-4.	4/5		3	X		2			X
Obstruction of Justice # (REFER TO MATERIAL DURING CITP PHASE 6) <u>No longer formally taught to CITP.</u>		A	B	C	D	E	F	G	H	I
19	Identify conduct that can be prosecuted under Title 18 U.S.C. §§ 1503 and 1510...	#								
20	Identify the groups of persons who are protected under Title 18 U.S.C. §§ 1512 and 1513.	#								

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21	Identify conduct that constitutes "tampering," in violation of Title 18 U.S.C. § 1512 and conduct that constitutes "retaliation" in violation of Title 18 U.S.C. § 1513.	#								
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#INSTRUCTOR NOTE: Obstruction is referred to during CITP PHASE 6 briefings..

Federal Fraud Statutes (2 hours) Taught as FCL 6 to CITP.		A	B	C	D	E	F	G	H	I
22	Identify and apply the elements of the Mail Fraud statute, Title 18 U.S.C. § 1341 and the Wire Fraud Statute, Title 18 U.S.C. § 1343.	6								
23	Identify and apply the elements of the National Stolen Property Act, Title 18 U.S.C. § 2314.	6								
Theft SEE TEACHING NOTE AT <u>END</u> OF CHART		A	B	C	D	E	F	G	H	I
24	Identify and apply the elements of Title 18 U.S.C. § 641.	C B T		3			3		2	
False Claims										
25	IDENTIFY AND APPLY THE ELEMENTS OF PRESENTING A FALSE, FICTITIOUS OR FRAUDULENT CLAIM									

FCL3 CITP TEACHING NOTE

FCL 3:

Includes entrapment / false statements / drug offenses

Theft is taught via CBT

Note: Theft CBT material is tested in E03

CITP TEACHING NOTE

FCL 6 BLOCK OF INSTRUCTION IS FRAUD

UPTP

FCL3 includes theft / false statements / parties

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LMTP

FCL3 includes theft / false statements / parties

ICE D

FCL3 includes entrapment / false statements

STUDENT SPECIAL REQUIREMENTS:

For each Session, students will refer to the corresponding section of the student text.

METHOD OF EVALUATION:

Written, multiple-choice examination.

INSTRUCTOR GUIDE

METHODOLOGIES:

1. Lecture
2. Question and answer

TRAINING AIDS:

1. Instructor: PowerPoint / Overhead Projector.
2. Student: Student text

SPECIAL INSTRUCTOR REQUIREMENTS:

NONE

OUTLINE OF INSTRUCTION

I. INTRODUCTION TO CRIMINAL LAW / ASSAULT / BRIBERY

A. RAPPORT AND OPENING STATEMENT

1. Criminal law is a very broad legal area. While officers should strive to learn every aspect of criminal law which applies to their job, it is not possible for a new officer to become an expert in criminal law during a brief training period. This course provides an overview of the fundamentals of criminal law and training on selected Federal criminal offenses.
2. This first block of instruction covers Introduction to Criminal Law, Assault, and Bribery. Bribery (18 U.S.C. § 201) is not an EPO for all students. Instructors should refer to the master list and teach the Bribery EPO only to those students who are required to receive this instruction.

B. ENABLING PERFORMANCE OBJECTIVES

EPO #1: Identify and apply the elements of a criminal statute.

EPO #2: Distinguish between a felony and a misdemeanor

EPO #3: Identify and apply the Assimilative Crimes Act and distinguish between exclusive, concurrent, and proprietary jurisdiction.

EPO #4: Identify the elements of Title 18 U.S.C. § 111.

EPO #5: Identify the elements of Title 18 U.S.C. § 201.

C. EPO #1: IDENTIFY AND APPLY THE ELEMENTS OF A CRIMINAL STATUTE

1. Criminal law is a foundation of the criminal justice system. The subject of criminal law studies what actions are criminally punishable by the government. A crime is an act, or failure to act, punishable by the government. Typical crimes include robbery, rape, burglary, and murder. Crimes are different from torts in that criminal actions are brought by the government for the purpose of punishing the wrongdoer and deterring others from similar conduct. A tort is a civil action for compensation. For example, if a criminal committed a burglary, the government could prosecute him and place him in jail. In a tort action, the victim could sue the wrongdoer for an intentional tort to recover his stolen items.

2. All criminal statutes in the United States are in writing. Each statute contains elements, or components. Each of these elements must be met for the crime to have been completed. At trial the prosecution must prove all the elements of a crime beyond a reasonable doubt to obtain a conviction. Most crimes require a criminal intent and criminal act. In other words, an individual must both intend to commit a crime and then act in furtherance of that intent. However, that is not true in all cases. For example, a parent could be criminally charged with child abuse for not acting to care for his child.
3. Motive is a very important fact for the investigator and prosecutor. It can be used to solve crimes by identifying potential perpetrators and to prove criminal intent. However, motive is usually never an element of a crime. So-called "hate crime" legislation aimed at those who target certain individuals for assault (minorities, homosexuals, etc.) is an exception to this rule. While brief reference may be made to these laws in class, the issues raised by considering motive in prosecuting "hate crimes" is beyond the scope of this course.
4. A crime contains an *actus reus* (act) and, usually, a *mens rea* (intent or state of mind). More specifically, a person may not be convicted of an offense unless the prosecutor proves beyond a reasonable doubt that the defendant, with the requisite mental state, performed a voluntary act and proximately caused the proscribed social harm (crime). Except in rare circumstances, a person is not guilty of an offense unless he performs a voluntary act (or omits an act that is his legal duty to perform) that causes social harm (*actus reus*), with a guilty mind (*mens rea*).
 - a. *Actus Reus* – means the act itself (i.e., assault, killing, stealing, etc.).
 - b. Definitions of *Mens Rea* (mental state).
 - 1) Broadly defined as a general immorality of motive, vicious will or an "evil-meaning mind."
 - 2) Narrowly defined as "the particular mental state provided for in the definition of the offense." This is more commonly referred to as the "Elemental" meaning of *mens rea*.
 - a) Example – murder is defined as "the intentional killing of a human being by another human being."

- (1) *Actus reus* is the killing of a human being by another human being.
 - (2) *Mens rea* is that the killing was intentional.
 - 3) Common *Mens Rea* (criminal act) terms:
 - a) Intentionally
 - b) Willfully
 - c) Negligently
 - d) Recklessly
 - e) Maliciously
- 5. There are two kinds of Criminal Intent
 - a. General Intent – any offense for which the only mens rea required was blameworthy state of mind. No specific mental state is required in the definition of the crime.
 - b. Specific Intent - the definition of the offense expressly required proof of a particular mental state. The definition of the crime (1) includes the intent to do some future act, or achieves some further consequence (i.e., a special motive for the conduct), beyond the conduct or result that constitutes the *actus reus* of the offense, or (2) provides that the actor must be aware of a statutory attendant circumstance.
- 6. There are three basic elements to any criminal statute:
 - a. An Act or Failure to Act (*actus reus*)
 - b. A Criminal Intent (*mens rea*)
 - 1) General Intent; or
 - 2) Specific Intent
 - c. A Penalty or Punishment by the Government
- 7. The elements of crimes are best explained by example. The federal crime of murder, 18 U.S.C. § 1111 requires “the unlawful killing of a human being with malice aforethought.” Murder requires a criminal intent, malice aforethought. Murder also requires a criminal act, to wit: the unlawful killing of a human being. This statutory construction is typical of criminal statutes in the United States.

8. All criminal statutes also require a penalty. Without penalties, our criminal system would have no meaning. These penalties can include fines, probation, incarceration and death. Most criminal statutes provide a range of potential penalties, based on the severity of the offense.

D. EPO #2: DISTINGUISH BETWEEN A FELONY AND A MISDEMEANOR

1. Crimes are distinguished by the potential penalty faced by the criminal. In general, both the federal government and the States define a felony as an offense punishable by over one year in prison. A misdemeanor is an offense punishable by no more than a year in prison.
2. 18 U.S.C. § 3559 specifically classifies federal sentences. A felony is an offense for which the maximum term of imprisonment authorized is more than one year. A misdemeanor is an offense for which the maximum term of imprisonment is one year or less.

E. EPO #3: IDENTIFY AND APPLY THE ASSIMILATIVE CRIMES ACT AND DISTINGUISH BETWEEN EXCLUSIVE, CONCURRENT AND PROPRIETARY JURISDICTION

1. Jurisdiction relates to the legal authority to act where the crime was committed. The authority of the United States (and therefore its law enforcement officers) depends on the type of jurisdiction applicable to a certain area. Within the boundaries of the United States, there are three basic types of jurisdiction. These are exclusive jurisdiction, concurrent jurisdiction, and proprietary jurisdiction. Before examining jurisdiction it is necessary to determine what type of federal law is to be enforced.
2. Types of Federal Laws
 - a. Laws of General Application: Laws passed by Congress that are “necessary and proper” for the conduct of its business. (There is some federal connection, and regardless of where the crime occurs, the defendant can be prosecuted by the Federal Government).
 - b. Examples of laws of general application: 18 U.S.C. §111. Assault on Federal Employee; 18 U.S.C. §641. Theft of Government Property; 18 U.S.C. § 71 Conspiracy; 18 U.S.C. §201 Bribery; 18 U.S.C. §1001. False Statements.
 - c. Other Federal Laws: where the location of the offense matters. These statutes only apply on certain federal land where the federal government has jurisdiction.

- d. Examples: 18 U.S.C. §1852 Timber removed or transported (. . . that is growing on the public lands of the United States . . .); 18 U.S.C. §1853 Trees cut or injured (. . . growing upon any land of the United States . . .); 18 U.S.C. §661. Theft of Non-Government Property (within the special maritime and territorial jurisdiction) of the United States.
3. Federal Jurisdiction: There are several ways the Federal government obtains the right to enforce its laws on land acquired within a state.
- a. Article 1, § 8, Clause 17 of the United States Constitution.
 - 1) "The Congress shall have Power...To exercise exclusive Legislation in all cases whatsoever, over such District (not exceeding ten Miles square) as may, by cession of particular States, and the Acceptance of Congress, become the seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful Buildings; --"...
 - b. Other Methods of Acquiring Jurisdiction:
 - 1) Federal reservation (often lands always held in Federal ownership);
 - 2) State cession of land to the Federal government for post offices, military installations, prisons, etc. (particularly prior to 1940).
 - 3) Title 40 U.S.C. §255 (U.S. Govt. must accept State's cession offer post -1940)
 - c. Basic Constitutional Authority for Land Management Agencies: The Property Clause. In sum, the Property Clause of the Constitution provides that: "*The Congress shall have Power to dispose of and make all needful rules and Regulations respecting the Territory or other Property belonging to the United States....*" U. S. Const., art. IV, § 3, Cl. 2.

- d. Exclusive Jurisdiction: Exclusive jurisdiction exists where the Federal government has received, by whatever method, all the law enforcement authority of the State with no reservations made to the State. The Federal government conducts all law enforcement activities within these types of areas. State and local law enforcement have no jurisdiction to enforce laws in these areas. Examples areas of exclusive jurisdiction are Yellowstone National Park, and some Federal buildings and military installations.
- e. Concurrent Jurisdiction: Concurrent jurisdiction exists where a State has granted law enforcement authority to the United States while reserving to itself the right to exercise full law enforcement authority over the area concurrently. In areas of concurrent jurisdiction, both State and Federal Governments may conduct law enforcement activities and may prosecute for criminal violations in their respective court systems. Examples of areas of concurrent jurisdiction are Cape Canaveral National Sea Shore, Grand Canyon National Park, and some military installations.
- f. Proprietary Jurisdiction: Proprietary jurisdiction exists where the Federal government has acquired some right or title to lands but has not obtained any measure of the State's authority over the area. The Federal government may buy or lease the property, but generally has rights equivalent to a private landowner. However, under the Supremacy and Property Clause of the United States Constitution, Federal law enforcement officers may enforce laws of general application and Federal regulations enacted to protect these areas. Most Forest Service and BLM lands in the western United States are considered owned under proprietary jurisdiction. As public land in the West was withdrawn from entry and private ownership to create the National Forests, Congress made it clear that the affected States would not lose jurisdiction over these properties. Title 16 U.S.C. §480 states:

"The jurisdiction, both civil and criminal over persons within National Forests shall not be affected or changed by reason of their existence except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the state wherein any such National Forest is situated shall not, by reason of the establishment thereof, lose its jurisdiction nor the inhabitants thereof, their rights and privileges as citizens or be absolved from their duties as citizens of the state."

4. Assimilative Crimes Act. The Assimilative Crimes Act (Title 18 U.S.C. §13) comes from the word "assimilate", which means to take in and incorporate as one's own; to absorb. The first such law was passed in 1825. The present act was passed in 1948, and last amended in 1996. It provides, in pertinent part, that:
 - a. "Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in § 7 of this title [the statute defining "special maritime and territorial jurisdiction of the U.S."], or on, above, or below any portion of the territorial sea of the United States not within the jurisdiction of any State, Commonwealth, territory, possession, or district is guilty of any act or omission which, although not made punishable by enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment."
 - b. "... for purposes of subsection (a) of this section, that which may or shall be imposed through judicial or administrative action under the law of a State, territory, possession, or district, for a conviction for operating a motor vehicle under the influence of a drug or alcohol, shall be considered to be a punishment provided by that law.
 - c. Any limitation on the right or privilege to operate a motor vehicle imposed under this subsection shall apply only to the special maritime and territorial jurisdiction of the United States."

5. Policy Behind the Statute. The policy behind this statute is to afford those persons on Federal enclaves the same protection as citizens within the surrounding State, and allow State law to become Federal law when there is no Federal law available. The Assimilative Crimes Act allows acts to be prosecuted in Federal court which:
 - a. Are a violation of State law,
 - b. Committed on property where the United States has either exclusive or concurrent jurisdiction and
 - c. There is no Federal law available to charge.
6. Assimilation is not available in areas of proprietary jurisdiction. Officers must first know if they are operating within an area of exclusive or concurrent jurisdiction in order to know if they can assimilate state laws.
7. A Federal Crime Must Not Exist. The Assimilative Crimes Act *operates only when Federal law has not defined the criminal offense.* When a Federal statute or regulation exists prohibiting the conduct, officers cannot use the Assimilative Crimes Act to enlarge or narrow the scope of the crime.

F. EPO# 4: IDENTIFY AND APPLY THE ELEMENTS OF TITLE 18 U.S.C. §111.

1. Every year, Federal law enforcement officers are assaulted in the line of duty. In order to deter offenders and punish them for using violence against federal officers and employees, Congress enacted 18 U.S.C. §111 entitled, Assaulting, resisting, or impeding certain officers or employees.

2. By common law definition, an assault is any willful attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability to do so, and any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm... A battery is intentional and wrongful non-consensual physical contact (touching) by a person (or an object controlled by that person) with another person. Most modern statutes and 18 U.S.C. § 111 use the term "assault" to include both the common law acts of assault and battery... The statute however, protects federal officers by punishing assaults as well as interference with federal law enforcement activities to ensure the integrity of federal operations by punishing obstruction and other forms of resistance. United States v. Williams, 2010 U.S. App. LEXIS 5997. (**Note:** circuits disagree as to whether or not a misdemeanor conviction requires assaultive conduct - 6th Circuit does not, where as the 9th and D.C. circuits do).
3. 18 U.S.C. §111 protects individuals designated in 18 U.S.C. §1114 from assault. Those designated in 18 U.S.C. §1114 for protection under 18 U.S.C. §111 include "any officer or employee of the United States or of any agency in any branch of the United States government (including any member of the uniformed services), or any person assisting such an officer or employee in the performance of such duties or on account of that assistance"
4. Specifically, 18 U.S.C. §111 reads as follows:
 - a. "Whoever-- (1) *forcibly* assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in §1114 of this title while engaged in or on account of the performance of official duties; or (2) forcibly assaults or intimidates any person who formerly served as a person designated in §1114 on account of the performance of official duties during such person's term of service, shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and where such acts involve physical contact with the victim of that assault or the intent to commit another felony, be fined under this title or imprisoned not more than 8 years, or both."

- b. "Enhanced penalty. Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both."
- 5. 18 U.S.C. §1114 reads as follows:
 - a. "Whoever kills or attempts to kill any officer or employee of the United States, or of any agency in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee in the performance of such duties or on account of that assistance, shall be punished . . ."
- 6. Of additional interest: Title 18, U.S.C. §115, "Influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member." This statute: (1) protects the families of public officials, judges, and law enforcement officers from retaliatory assault, kidnapping, or murder (including attempts) and (2) punishes threats to do so when the intent is to impede, intimidate or interfere with the Federal official's duty.
- 7. "Forcibly" means by use of force.
 - a. *Actual physical contact is not necessary.* Force need not actually have been used; it is sufficient if it was imminently threatened. United States v. Walker, 835 F.2d 983 (2d. Cir. 1987).

- b. "Forcibly" as used in this section means the defendant forcibly assaulted *or* forcibly resisted *or* forcibly opposed *or* forcibly impeded *or* forcibly intimidated *or* forcibly interfered with the victim but the government need not prove that the defendant did all of those things. It is sufficient that he did any one of the acts charged. Long v. United States, 199 F.2d 717 (4th Cir. 1952). The courts are divided on whether there must be some form of common-law assault to support a charge under 18 U.S.C. 111. It appears the most logical reading is that an individual who refuses lawful commands and must be subdued by force is in violation of 18 U.S.C. 111. United States v. Gagnon, 553 F.3d 1021 (6th Cir. 2009). However, some courts have held that merely refusing an order (such as "tensing up" and standing firm when an officer attempts to handcuff) is not sufficient to support a charge under 18 U.S.C. 111. United States v. Chapman, 528 F.3d 1215 (9th Cir. 2008).
- c. Lifting of a menacing hand toward an officer, or shoving, or spitting in the officer's face, can be prosecuted under §111. Although some use of force is required, §111 does not require that the Federal officer be placed in fear or injured.
- d. All threats of imminent physical harm and any use of physical force is sufficient to satisfy the element of assault. Many fact patterns satisfy this element, including interfering in a pursuit by federal officers, letting dogs loose to attack federal officers, and pointing an empty gun at officers. There must be proof that the alleged threat would objectively inspire fear of pain, bodily harm, or death that is likely to be inflicted immediately. United States v. Hertular, 562 F.3d 433 (2nd Cir. 2009).
- e. Resistance:
As a general rule, no person has a right to resist arrest. Even where the arrest is unlawful, the remedy is for the suspect to submit to the arrest and then file civil and/or criminal charges. Therefore, the unlawfulness of the arrest is not a defense. However, there is some case law suggesting that the use of minimal force to resist unlawful arrest does not violate the law. Realistically, the Department of Justice would not likely pursue a prosecution against an individual who used minimal resistance (like pushing or running away) to avoid an unlawful arrest.

8. Performance of Official Duties: While § 111 does not set forth what constitutes "official duties" and courts construing this language agree that "there is no bright-line test to define performance of official duties." United States v. Hoy, 137 F.3d 726, 729 (2d Cir. 1998), quoting, United States v. Hoffer, 869 F.2d 123, 125 (1989).
- a. The courts in determining if a federal agent is engaged in the performance of his official duties examine whether the agent is acting within the scope of what he is employed to do or whether he was engaging in a personal frolic of his own. Hoffer, 869 F.2d at 126, quoting, United States v. Heliczer, 373 F.2d 241 (2d Cir. 1967), see also, United States v. Clemons, 32 F.3d 1504, 1507 (11th Cir. 1994); United States v. Cunningham, 509 F.2d 961 (U.S. App. D.C. 1975). Being engaged in the performance of official duties does not turn on whether the law being enforced is constitutional or applicable to the defendant, or whether the levy order being enforced was validly obtained. It does however turn on the whether the federal officer is acting within the scope of what he/she is employed to do. United States v. Troy, 583 F.3d 20, (1st Cir. 2009)...
 - b. Whether a federal officer wears a uniform, badge or other identifying credentials is not an essential component of the test, nor is location or work assignment. Defendants have faced criminal liability under § 111 when they assaulted:
 - 1) an off-duty park ranger enforcing park rules, United States v. Hohman, 825 F.2d 1363 (9th Cir. 1987);
 - a) an off-duty DEA officer getting a haircut and overhearing a robbery in progress, United States v. Reid, 517 F.2d 953 (2d Cir. 1975);
 - b) an IRS agent repossessing a car, United States v. Steich, 759 F.2d 579 (7th Cir. 1985);
 - c) a federal judge walking to the federal courthouse on a Sunday evening to research a case, United States v. Boone, 738 F.2d 763 (6th Cir. 1984);
 - d) a federal agent detaining a state-charged suspect, United States v. Lopez, 710 F.2d 1071 (5th Cir. 1983);

- (1) an off-duty deputy U.S. Marshal arresting a suspect after coming upon a street fracas, United States v. Hoy, 137 F.3d 726 (2d Cir. 1998).
 - (2) An immigration officer who entered a bar to investigate report of three unlawful immigrants was performance of official duties. Amaya v. United States, 247 F.2d 947 (9th Cir. 1957).
 - (3) A U.S. Secret Service agent who, while en route to investigation of credit card fraud, was assaulted after she stopped to assist a person at scene of accident, since her actions were professional and appropriate, and indicia of her official capacity were evident. United States v. Kelley, 850 F.2d 212 (5th Cir. 1988).
- e) Tribal law enforcement officers acting in the performance of their duties pursuant to contract with the Department of the Interior are protected by the statute. United States v. Oakie, (1993 CA8 SD) 12 F.3d 1436. The fact that officer had not completed training required of officers who exercise Bureau's law enforcement authority does not disqualify an officer as federal officer at time of incident. United States v. Roy (2005, CA8 SD) 408 F3d 484.
- c. Each of these cases illustrates the fluidity of the term "while engaged" and refuses to define "official duties" either with a rigid time line or highly circumscribed activity. Additionally, Congress has made no attempt to circumscribe these holdings. Hoy, at 730.

- d. An agent need not be actually engaged in the performance of his duties to come under the protection of this section. Federal employees are also protected from retaliatory assaults initiated on account of the performance of official duties. For example: A DEA Agent was a guest at a wedding reception when he was singled out and brutally attacked solely because he was a DEA Agent. United States v. Velarde, 528 F.2d 387, (9th Cir. 1975). The assailant was convicted. United States v. Hohman, 825 F.2d 1363, 1365 (9th Cir. 1987) shows how a single assault can meet both variations of this element. Ranger Miller had finished his shift at Lake Mead NRA and changed into jogging shorts when he saw a loose dog on the beach. When he told the dog's owner that this violated park rules, the owner (Hohman) punched him twice. Ranger Miller's supervisor testified that he "was required to enforce park regulations 24 hours a day." In the words of the court: "When Miller asked Hohman to comply with local regulations by removing the dog, he was 'engaged' in the performance of his duties. When Hohman struck Wilson, it was 'on account of' that performance."
- 9. Protection under § 111 for those individuals who are not federal employees or officers but who are assaulted while assisting such officer or employee.
 - a. Courts have broadly interpreted the term "assisting such officer or employee" mentioned in §1114.
 - b. In United States v. Murphy, 35 F.3d 143, 145 (4th Cir. 1994), the court held that a local jailor assisting the U.S. Marshal Service in the transfer of the defendant to another facility was afforded protection under § § 111 and 1114. The court held that the common usage of the term "to assist" meant that the person was being used to help a federal agent, which was what happened in this case.
 - c. In United States v. Chun, 347 F.2d 717, 721 (4th Cir. 1965) the court held that a state agent on loan to the IRS and assisting federal agents is a federal officer for purposes of § 111.

- d. In *United States v. Matthews*, 106 F.3d 1092, 1093 (2d Cir. 1997) the court expanded the definition of “assisting” to protect a handyman employed by a private company to install wallboard in a hotel that had been seized by the federal government in a civil forfeiture proceeding. The defendant, a tenant in the hotel, pulled a knife on one of the workers who, he thought, was installing the wallboard incorrectly. The court affirmed the defendant’s conviction under § 111, holding that the handyman “assisting” the Marshal’s service based on the government’s seizure of the hotel.
10. Knowledge and Intent: The Supreme Court has found that when enacting 18 U.S.C. §111 Congress intended to protect both federal officers and federal functions and insure a federal forum for the trial of offenses involving federal officers. *United States v. Feola*, 420 U.S. 671, 679, 683-84 (1975).
- a. All that section 111 requires is an intent to assault, not an intent to assault a Federal officer—even where the officer is an undercover agent and the assailant is not aware the officer is a Federal officer. *United States v. Feola*, 420 U.S. 671 (1975).
 - b. The assault must be willful. In other words the defendant acted voluntarily and intentionally, and not by mistake or accident.
11. Penalties. 18 U.S.C. §111 has three penalty tiers...
- a. Simple assault, i.e., an attempt or threat to do bodily harm that does not involve an actual touching or a dangerous weapon is a misdemeanor punishable by up to one year imprisonment.
 - b. “All other cases” are felonies punishable by 8 years. These offenses involve contact but were not committed with a weapon and did not result in bodily injury.

- c. 18 U.S.C. §111(b) creates an enhanced penalty when a "deadly or dangerous weapon" is used or "bodily injury" results. The penalty for this offense is 20 years. In defining a dangerous weapon, the statute specifically includes "a weapon intended to cause death or danger but which fails to do so by reason of a defective component." Almost any object which is used or attempted to be used in a way that can endanger life or inflict great bodily harm can be a dangerous weapon. United States v. Barber, 297 F. Supp. 917, 923 (D. Del. 1969) collected the following examples: "shoes on feet" can be a dangerous weapon, Medlin v. United States, 207 F.2d 33 (D.C. Cir. 1953), as well as a "wine bottle," Thornton v. United States, 268 F.2d 583 (D.C. Cir. 1959), a "rake," Eagleston v. United States, 172 F.2d 194 (9th Cir. 1949), a "chair," United States v. Johnson, 324 F.2d 264 (4th Cir. 1963), a "brick," State v. Perry, 226 N.C. 530, 39 S.E. 2d 460 (1946), or a "chair leg," Wisniewski v. State, 51 Del. 84, 138 A.2d 333, 341-342 (1957). Other examples include the teeth of an HIV-positive inmate, United States v. Moore, 669 F.Supp. 289 (D.C. Minn. 1987), a defective zip gun, United States v. Gometz, 879 F.2d 256 (7th Cir. 1989), a patrol car door kicked into the shins of an MP by a handcuffed suspect, United States v. Sherwin, 271 F.3d 1231 (10th Cir. 2001), and a walking stick, United States v. Loman, 551 F.2d 164 (7th Cir. 1977)...

G. EPO#5: IDENTIFY AND APPLY THE ELEMENTS OF TITLE 18 U.S.C. § 201.

1. All citizens have a right to fair and ethical treatment by Federal employees. Additionally, federal employees and citizens must rely upon the honesty of those participating in official positions, such as judges, jurors and witnesses. The bribery statute, 18 U.S.C. § 201, is designed to punish corruption in the federal system.
2. To secure a conviction for bribery under 18 U.S.C. §201(b), the government must prove:
 - a. A corrupt offer or acceptance of something of value;
 - b. That such corrupt offer or acceptance was made to or by an officer of the United States, or person at the time acting for or on behalf of the United States in an official function; and

- c. That the offer or acceptance was intended to influence the officer or person in the doing of some particular act or performance of some duty in the public official's official capacity.
- 3. Intent: "Bribery" under 18 U.S.C. §201 (b) requires proof of corrupt criminal intent. It is generally agreed that it involves a bad or evil purpose or motive.
- 4. EXAMPLES:
 - a. Defendant #1 offered Army Recruiter \$450 to keep Defendant #2 out of the service. Hurley v. United States, 192 F.2d 297 (4th Cir. 1951).
 - b. Defendant gave money to a chief narcotics investigator to release him and give narcotics back. Hone Wu v. United States, 60 F.2d 189 (7th Cir. 1932).
- 5. 18 U.S.C. §201(c) deals with the lesser included offense of giving or receiving a gratuity. Proof of conduct under these subsections differs from that of bribery. United States v. Hsieh Hui Mei Chen, 754 F.2d 817 (9th Cir. 1985).
 - a. Unlike bribery, there is no requirement of a "corrupt" offer or acceptance. Students may ask an instructor to clarify this difference between bribery and illegal gratuities. This distinction in criminal intent between the two offenses generally turns on circumstantial evidence and is often obscure in particular cases; hence, the issue is often sent to the jury. One commentator [Strader, Understanding White Collar Crime, § 8.03 (2002)] summarizes the case law with these observations. First, while bribery must involve a contemplated quid pro quo nexus between the bribe and the official act, this need not be proven to establish an illegal gratuity. Second, bribery necessarily begins with a scheme to influence future official action, while gratuity can be paid illegally even after the official act was already completed entirely uninfluenced by the later payment of the gratuity.
 - b. The government must merely establish that something of value was given to a public official for or because of an official act performed or to be performed.

The quid pro quo for bribery is a payment made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. Similarly, when the government seeks to improve honest services fraud, in the form of bribery, it must prove a quid pro quo that is clear and unambiguous, leaving no uncertainty about the terms of the bargain. Private gain is not a necessary element of honest services fraud. The intent to defraud does not depend on the intent to gain, but rather on the intent to deprive. United States v. Inzunza, 580 F.3d 894 (9th Cir. 2009). NOTE: 10th Circuit agrees; 3rd Circuit agrees because requiring private gain would merely substitute one ambiguous standard for another; 5th Circuit agrees because it has adopted a state-law-violation requirement; but the 7th Circuit disagrees, as it requires proof of private gain (citations omitted).

- c. Agency ethics officers can provide specific guidance regarding gratuities. Students should be advised that every agency has an office that can advise them about ethics rules including gratuities.
6. Other considerations in charging this offense:
- a. Both the person offering the bribe and the person who accepts it are culpable for the offense.
 - b. Title 18 U.S.C. §201(b)(2) is violated even though the official who is offered a bribe is not corrupted or the object of the bribe cannot be attained.
 - c. United States v. Arroyo, 581 F.2d 649 (7th Cir. 1978). In order for the crime of bribery to be committed, it is not necessary that the public official actually have the power to perform the act that he promises in return for money. The public official must only represent that the money will be for the purpose of influencing the performance of some official act.
 - d. The term "something of value" has been broadly construed. In United States v. Gorman, 807 F.2d 1299, 1304-1305 (6th Cir. 1986), the term included a loan and a promise of a job. The court, after finding that the defendant could not have gotten the loan from a bank and that the offered job included a substantial raise, concluded that these items had value sufficient to sustain an illegal gratuity conviction.
7. The definition of public official:

- a. "The term 'public official' means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror."
- b. Public official has been broadly construed by the courts to include persons selected to be public officials, and a number of other related persons. It is clear that state and local government employees who are administering federal programs qualify as public officials. Where the charged public official is a congressman, the official acts described by **18 USCS § 201(a)(3)** is not limited to so-called legislative acts such as voting on or introducing piece of legislation; rather, §201 has been read sufficiently broadly to encompass all of acts normally thought to constitute congressman's legitimate use of his office; moreover, charged public official need not have authority to make final decision or take binding action on question, matter, etc., at issue; rather, § 201 covers any situation in which advice or recommendation of public official would be influential, irrespective of official's specific authority (or lack of same) to make a binding decision. United States v Jefferson (2009, ED Va) 634 F Supp 2d 595.
- c. The term "person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed.
- d. The statute also prohibits bribes or gratuities to persons who are former public officials (presumably because of any remaining official influence they might have).
- e. The statute also prohibits bribes or gratuities to witnesses for their testimony.

- f. The reach of federal prosecution into the activities of state and local officials administering federal funds was expanded by the Supreme Court in United States v. Dixon, 465 U.S. 482 (1984) and by Congress with the passage of 18 U.S.C. § 666, "Theft or bribery concerning programs receiving federal funds."

II. FEDERAL FIREARMS VIOLATIONS

A. RAPPORT AND OPENING STATEMENT

1. All law enforcement officers face the possibility of encountering firearms on the job. This course provides a basic introduction to selected federal firearms laws. There are many federal firearms laws which this course does not address. Likewise, this course does not address agency-specific officer concerns, such as the ability to carry off-duty, the ability to carry personal weapons, etc.
2. Many states and municipalities have firearms laws which are more restrictive than federal law. Federal law enforcement officers should acquaint themselves with the firearms laws applicable in their jurisdiction.
3. During this course students will learn that machine guns, sawed-off weapons, and other extremely dangerous weapons can be legally possessed if strict legal requirements are met. However, officer safety is a paramount concern. The officer should always take steps to insure his safety and the safety of others before investigating to see if a weapon is legally possessed.

INSTRUCTOR NOTE: The Supreme Court, in District of Columbia v. Heller, _____ U.S. _____, 128 S.Ct. 2783, 171 L.Ed 2nd 637 (2008) in ruling that the 2nd Amendment protects the right to keep and bear arms for the purpose of self-defense struck down a District of Columbia law that banned the possession of handguns in the home. This same right is applicable to the States as well - the framers of the Fourteenth Amendment considered the right to keep and bear arms to be fundamental. McDonald v. City of Chicago, 2010 US. LEXIS 5523.

B. ENABLING PERFORMANCE OBJECTIVES (EPO)

1. EPO #6: Identify categories of individuals prohibited from possessing firearms.
2. EPO #7: Identify and apply procedures to initiate a firearms trace through the Bureau of Alcohol, Tobacco & Firearms.
3. EPO #8: Identify the weapons listed in 18 U.S.C. §922(a)(4) which require registration with the Bureau of Alcohol, Tobacco & Firearms, and those weapons prohibited on a federal facility.

C. EPO #6: IDENTIFY CATEGORIES OF INDIVIDUALS PROHIBITED FROM POSSESSING FIREARMS.

1. A firearm is any weapon that will expel a projectile by explosive. This definition includes the frame or receiver of such weapon, a silencer or muffler, or any destructive device. 18 U.S.C. §921(a)(3). The definition does not include “antique” firearms (those manufactured prior to 1899), air-powered weapons like BB and pellet guns, black powder weapons and authentic replicas of antique firearms. 18 U.S.C. §921(a)(16).
2. Title 18 U.S.C. §922(g) prohibits certain individuals from knowingly [see 18 U.S.C. §924(a)(2)] “possessing in or affecting [interstate or foreign] commerce, any firearm **or ammunition.**” Under 18 U.S.C. §922(g), it is unlawful for the following individuals to possess firearms.
 - a. Anyone “who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year.” This is referred to generically as a “convicted felon,” but does not include individuals convicted of:
 - 1) A Federal or State offense pertaining to antitrust violations, unfair trade practices or similar offenses relating to the regulation of business practices, or
 - 2) “any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.” See 18 U.S.C. § 921(a)(20).
 - 3) “Any court” includes federal convictions, state convictions, and courts-martial. Foreign convictions are NOT included. Small v. United States, 125 S. Ct. 1752 (2005). This resolves an earlier split among the circuits regarding the issue of whether “any court” included foreign courts. Thus, even a foreign conviction punishable by imprisonment for a term exceeding one year cannot serve as a predicate offense for 18 U.S.C. § 922(g)(1).

INSTRUCTORS NOTE: Being found in possession of a loaded firearm is sufficient evidence to conclude that the defendant knowingly possessed the ammunition in the firearm. United States v. Cook, 2010 U.S. App. LEXIS 9372

- b. a “fugitive from justice”

- 1) meaning “any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding.” 18 U.S.C. § 921(a)(15)
- c. an unlawful user or addict of a controlled substance;
[INSTRUCTORS NOTE: a defendant who receives a gun **for** drugs is possessing a firearm that furthers, advances, or helps the distribution of drugs in violation of 18 U.S.C. §924(c)(1)(A)]. United States v. Doody, 2010 U.S. App. LEXIS 6908. The statute also requires that when a defendant uses a firearm involving a predicate offense for enhanced punishment, the firearm must be real – a toy gun does not suffice. United States v. Leon-Quinones, 2009 U.S. App. LEXIS 26617
- d. an individual who has been adjudicated a mental defective or who has been committed to a mental institution
 - 1) Note that individual must have been “adjudicated” mentally defective or “committed” to an institution. Voluntarily seeking treatment does not make an individual prohibited.
 - 2) **INSTRUCTOR NOTE:** After the tragic events in April, 2007, at Virginia Tech [deranged student Cho kills 32 students and faculty and himself], Congress passed and the President signed into law the National Instant Criminal Background System [NICS] Improvement Amendments Act of 2007 (P.L. 110-180, Jan. 8, 2008). This law clarified (slightly) state (and federal) reporting requirements for this category and (more significantly) appropriated \$975,000,000 to states over the next 5 fiscal years to fund automated data collection and reporting systems to notify NICS of adjudicated mental defectives and those committed to a mental institution.
- e. an illegal alien or non-permanent resident alien, unless that alien has special permission to carry a firearm for hunting or sporting purposes or is authorized to carry a weapon as a foreign official. See 18 U.S.C. § 922(y)(2).
- f. an individual who has been dishonorably discharged from the Armed Forces
- g. anyone who has renounced his United States citizenship

- h. anyone subject to a court order restraining him from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner under these circumstances:
 - 1) there must have been a hearing for which the prohibited person received notice and a chance to participate;
 - 2) the restraining order must : (a) find the person a credible threat to physical safety of child or intimate partner, or (b) by its terms explicitly prohibit the use, attempted use, or threatened use of physical force against intimate partner or child that would be expected to cause injury.
- i. or, who has been convicted of a misdemeanor crime of domestic violence
 - 1) meaning a crime that "is a misdemeanor under Federal or State law" and "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim." 18 U.S.C. §921(a)(33)(A).

this provision is particularly controversial, since some law enforcement officers lost their jobs when this provision was added in 1996.
 - 2) A person is not considered convicted of a disqualifying offense unless they had:
 - a) right to counsel, and
 - b) in a case in which they were entitled to a jury, the opportunity to have a jury or make a knowing and intelligent waiver of the right to jury. See 18 U.S.C. §921(a)(33)(B).

- 3) In February 2009, the Supreme Court held [7-2] that the earlier domestic violence conviction [“predicate offense”] need not be for a crime that expressly contains as an element the domestic connection between assailant and victim. In 1994, Danny Hayes was convicted of misdemeanor battery in West Virginia. The woman he had beaten was his then-wife, the mother of his child and the woman with whom he lived. In 2004, officers, responding to a 911 call concerning domestic violence, went to the Hayes home. After Hayes consented to a search, the officers found a rifle. Other evidence was developed showing that Hayes had recently possessed other firearms as well. He appealed his conviction for three counts of possessing a firearm after being earlier convicted of a misdemeanor crime of domestic violence. The Supreme Court held that once the government had proven the domestic connection between Hayes and his victim in the 1994 misdemeanor battery conviction, he could be found guilty. United States v. Hayes, 129 S.Ct. 1079; 172 L.Ed. 2d 816; 2009 U.S. LEXIS 1634 (2009).
3. A person who receives a complete pardon or expungement of a felony or misdemeanor crime of domestic violence conviction is no longer considered convicted. However, if the pardon or expungement is qualified by the condition that the person may not possess firearms, then he is still prohibited from possessing firearms under federal law. See 18 U.S.C. §921(a)(20) and 18 U.S.C. § 921(a)(33)(B)(ii).
4. **INSTRUCTOR NOTE:** Additionally, 18 U.S.C. §922(n) prohibits a person indicted for a crime punishable by imprisonment for more than one year from receiving, transporting or shipping a firearm.

NOTE: During the break, many students enjoy inspecting and dry-firing the weapons in the Display Kit. This is an excellent way to encourage student interest in the subject. The Instructor should encourage this practice.

D. EPO #7: IDENTIFY AND APPLY PROCEDURES TO INITIATE A FIREARMS TRACE THROUGH THE BUREAU OF ALCOHOL, TOBACCO & FIREARMS

1. The primary reason to trace a firearm through the Bureau of Alcohol, Tobacco & Firearms (ATF) is to connect a firearm to a specific suspect. An ATF trace should reveal the manufacturer, the importer if the weapon is foreign made, the wholesale distributor, the weapon dealer, and the first retail purchaser from the dealer. While possible, it is unlikely that subsequent transactions (either legal or illegal) were reported to ATF. Since many weapons used in criminal activity have been stolen and repeatedly changed hands, an ATF trace may provide relatively little information. However, it may provide leads to sources of weapons. For example, an ATF trace would indicate if an individual was legally buying a large number of guns in a state where they are readily available and transporting them for sale to an area where they are not available. Example: a criminal buying many guns in Georgia and takes them to New York City to sell illegally for profit.) Likewise, an individual possessing a stolen firearm might be linked to the theft of the firearm.
2. Gun manufacturers assign serial numbers to their firearms. The numbers themselves are not unique. It is quite possible that two different models of guns would have the same serial number. Therefore, the serial number alone is not enough to run a trace. In order to successfully run a trace, the ATF must be provided with the following:
 - a. Make
 - b. Model
 - c. Serial Number
 - d. Caliber or gauge
3. **INSTRUCTOR NOTE:** ATF started an internet-based tracing system in January 2005 called eTrace. Available to LEOs of participating agencies and departments, eTrace has reduced the average response time to 8 business days. The new system also supports generating statistical reports (e.g., average time-to-crime for firearms in a given location) and database queries to detect patterns and trends.

E. EPO #8: IDENTIFY THE WEAPONS LISTED IN TITLE 18 U.S.C. § 922(A)(4) THAT REQUIRE REGISTRATION WITH THE BUREAU OF ALCOHOL, TOBACCO & FIREARMS AND THOSE WEAPONS PROHIBITED ON A FEDERAL FACILITY.

1. Weapons requiring BATF registration. Certain weapons are not illegal per se, but must be registered with ATF for their possession to be legal. These include short-barrel shotguns, short-barrel rifles, machine guns, silencers/mufflers, and destructive devices.
 - a. A short-barrel shotgun is a shotgun having a barrel less than 18 inches in length or an overall length of less than 26 inches. 18 U.S.C. §921(a)(6).
 - b. A short-barrel rifle is a rifle having a barrel less than 16 inches in length or an overall length of less than 26 inches. 18 U.S.C. §921(a)(8).
 - c. A machine gun is any firearm that fires more than one bullet with a single trigger pull.
 - d. A silencer or muffler is any device used to silence or quiet the report of a firearm. 18 U.S.C. §921(a)(24). This is not limited to high-tech pieces of equipment, but could include common items such as oil filters, potatoes, and plastic 2-liter bottles filled with industrial foam.
 - e. Destructive devices include bombs, grenades, rockets (with more than 4 oz. of propellant), missiles (with explosive charge more than one-quarter ounce), mines, or similar devices. The term also includes firearms with a bore greater than .50 caliber [except conventional shotguns]. 18 U.S.C. §921(a)(4).
2. If an officer sees a weapon which requires registration with ATF, the officer should always exercise safety precautions first and worry about checking the registration second. If any of these weapons are encountered on the street, it is extremely likely they are illegally possessed. While such weapons might be lawfully possessed in a home or business, it is still highly likely that the owner has not complied with the strict ATF requirements for possessing such weapons.

3. **INSTRUCTOR NOTE:** 26 U.S.C. §5861 prohibits possession of such unregistered weapons. That statute also prohibits transferring, receiving and making such a weapon. 26 U.S.C. § 5871 notes that such crimes are punishable by 10 years of imprisonment, and 26 U.S.C. § 5872 dictates forfeiture of such weapons and either their destruction, retention for federal purposes or resale to state or local governments.
4. Weapons prohibited in a federal facility. A "Federal facility" is "a building or part thereof owned or leased by the Federal Government, where Federal employees are regularly present for the purpose of performing their official duties." 18 U.S.C. §930(g)(1).
5. It is unlawful to knowingly bring a "dangerous weapon" onto a "Federal facility". Dangerous weapons include: any "weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 1/2 inches in length." 18 U.S.C. §930(g)(2). This is a very wide range of weapons. Law enforcement officers working on Federal facilities should understand that nearly any item which is used as a weapon or personal self-defense device is prohibited.
6. State, local and Federal law enforcement officers are exempt from this law while in the performance of their duties. However, many Federal facilities still require law enforcement officers to check their weapons. Law enforcement officers have no absolute right to carry their weapons on Federal facilities, and if required, must check their weapons.

III. ENTRAPMENT/FALSE STATEMENTS

A. RAPPORT AND OPENING STATEMENT

1. The goal of a criminal investigator is a successful prosecution. The entrapment defense precludes the conviction of an individual if it was the government who caused him to commit the crime.

2. The Federal defense of entrapment poses two questions: (1) did the government induce the accused to commit the offense; (2) if so was the accused ready and willing without persuasion to commit the offense. On the first question the accused has the burden; on the second the government has it. The defendant is entitled to a jury instruction on entrapment if there is sufficient evidence from which a reasonable jury could find entrapment. Mathews v. United States, 485 U.S. 58 (1988).
3. While performing their duties, Federal officers frequently encounter individuals who give them false information. An individual making such a false statement is usually violating 18 U.S.C. §1001. This statute can be an effective tool to punish the makers of material false statements.
4. INSTRUCTOR NOTE: False Statements, EPO #11, is also taught in the MBPTP and LMTP programs in conjunction with Theft/Embezzlement, EPO #24.

B. ENABLING PERFORMANCE OBJECTIVES (EPO)

1. EPO #9: Identify when inducements by the government are permitted or prohibited.
2. EPO #10: Identify when predisposition negates an apparent entrapment defense.
3. EPO #11: Identify and apply the elements of Title 18 U.S.C. §1001.

C. EPO #9: IDENTIFY WHEN INDUCEMENTS BY THE GOVERNMENT ARE PERMITTED OR PROHIBITED.

1. What is meant by "Entrapment"?
 - a. Entrapment is the act of government officers or their agents (e.g., informants) inducing a person to commit a crime not contemplated by that person, for the purpose of prosecuting that individual. An entrapment instruction will apply when the government conduct is such that a reasonable jury could find that it "creates a substantial risk that an un-disposed person or otherwise law-abiding citizen would commit the offense. United States v. Vincent, _____ F.3d _____ (10th Cir. 2010) ..
 - b. It is the conception and planning of an offense by officers or their agents and their procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer/agent. United States v. Russell, 411 U.S. 423 (1973).

- c. Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit the criminal act, and then induce commission of the crime so that the government may prosecute. . . Sorrells v. United States, 287 U.S. 435 (1932).
- d. Sentencing entrapment occurs when a defendant who lacks a predisposition to engage in more serious crime nevertheless does so "as a result of 'unrelenting government persistence.'" United States v. Veazey, 491 F.3d 700, 710 (7th Cir. 2007), quoting, United States v. Hale, 448, F.3d 971, 989 (7th Cir. 2006), cert. denied, 127 S.Ct. 1020, 166 L.Ed. 2d 783 (2007). To overcome this argument, the government need not explain or defend its motives, but must show only that the defendant was in fact predisposed to violate the law without "extraordinary inducements." United States v. White, 519 F.3d 342 (7th Cir. 2008).

2. The Entrapment Defense

- a. Entrapment is an "affirmative" defense. The defendant is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment. The question of entrapment is one for the jury, rather than for the judge. . . Mathews v. United States, 485 U.S. 58 (1988).
- b. The Supreme Court has held that even if the defendant denies one or more elements of the charge he is still entitled to the entrapment instruction if there is sufficient evidence from which a reasonable jury could find entrapment. Mathews v. United States, 485 U.S. 58 (1988).
- c. Thus, a defendant can raise entrapment even if this is inconsistent with his other defenses. . . Mathews v. United States, 485 U.S. 58 (1988).

3. Views of Entrapment

- a. Objective view: the emphasis is on police conduct rather than the defendant's state of mind. .

- b. Subjective view: the critical factor in the entrapment equation is the state of mind of the defendant. At issue is the defendant's predisposition to commit the offense charged. The question is whether the defendant, before contact with law enforcement officers or their agents, already possessed the state of mind to commit the offense charged. Once the defendant has raised the entrapment defense, the prosecution must negate it by establishing predisposition beyond a reasonable doubt. United States v. Navarro, 737 F.2d 625, 635 (7th Cir. 1984), cert. denied, 469 U.S. 1020 (1984). If defendant's predisposition is established, she would not be entrapped. Sorrells v. United States, 287 U.S. 435 (1932). The court in Sorrells barely upheld the subjective view. Twenty-six years later the Supreme Court upheld the subjective view and criticized the objective view as being unduly restrictive upon the prosecution. Sherman v. United States, 356 U.S. 369 (1958). The Supreme Court established the subjective view as the correct one to be used in all Federal Courts. Hampton v. U.S., 425 U.S. 484 (1976). **INSTRUCTOR NOTE:** Sorrells and Sherman, were 5-4 decisions and Hampton was a 5-3 decision.

4. Due Process Argument (Objective Entrapment)

- a. Some lower courts have observed that government conduct can be so outrageous that due process principles would absolutely bar the Government from obtaining a conviction. United States v. Twigg, 588 F.2d 373 (3rd Cir. 1978); United States v. Cuervelo, 949 F.2d 559 (2d Cir. 1991) (sex with defendant can rise to outrageous government conduct); United States v. Russell, 459 F.2d 671 (9th Cir. 1972) (government supplies precursor drug not available to the public). For a defendant to establish outrageous government conduct sufficient to support dismissal of an indictment, there must be government over-involvement combined with a passive role by the defendant. United States v. Carriles, 541 F.3d 344 (5th Cir. 2008). In United States v. Chisum, 312 F.Supp. 1307 (C.D.Cal. 1970), the indictment was dismissed when the defendant was supplied counterfeit currency by a government agent and then indicted for receiving counterfeit currency with the intent to pass as genuine.

- b. For example, threatening to injure the children of a target unless he committed a crime would cross this line and violate the Due Process Clause. Even if the target were predisposed to commit the crime, the Government's behavior would render the case non-prosecutable. If a prosecutor were foolish enough to proceed, the behavior would almost certainly lead to acquittal and a grave loss of public confidence in federal law enforcement. Obviously, such outrageous tactics are neither planned nor executed by professional federal law enforcement officers. But inadequately-controlled informants and other agents of the government can generate the grounds for this defense if their methods to develop cases become outrageously overzealous.

5. Inducement

- a. In general:
 - 1) There is a split of authority among the Circuits as to the amount of pressure that must be exerted by the government to form the basis for a properly supported entrapment instruction.
 - 2) Without some evidence of pressure exerted by the government, no instruction on the defense need be given.
- b. The Second Circuit defines inducement as "soliciting, proposing, initiating, preaching, or suggesting the commission of the offense charged." United States v. Dunn, 779 F.2d 157, 158 (2d Cir. 1985) quoting United States v. Sherman, 200 F.2d 880, 883 (2d Cir. 1952) (L. Hand, J). Inducement refers to "the government's initiation of the crime and not to the degree of pressure exerted." United States v. Riley, 363 F.2d 955, 958 (2d Cir. 1966).

- c. The First Circuit rejected this definition by distinguishing between solicitation and inducement. Mere solicitation would fail to meet the threshold criterion requiring the government to establish predisposition. Inducement requires evidence that shows the defendant was not ready to commit the crime charged. The Tenth Circuit also appears to require more than initiation or solicitation. At the far end of the spectrum, the Eleventh Circuit has held that the defendant must demonstrate not merely inducement or suggestion but an element of persuasion or mild coercion. United States v. Andrews, 765 F.2d 1491, 1499 (11th Cir. 1985).
 - d. If there is sufficient evidence of inducement to warrant an instruction, then the government must establish that the defendant was predisposed to commit the offense charged beyond a reasonable doubt. The sole issue would be whether the government carried its burden of proving the defendant was predisposed to violate the law before the government intervened. Jacobson v. United States, 503 U.S. 540 (1992).
 - e. Inducement by law enforcement officers may take many forms including persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based upon need, sympathy or friendship. Inducement may take different forms, including pressure, assurances that a person is not doing anything wrong, persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy, or friendship. Inducement, however, must consist of something more than an opportunity to break the law. It is well settled that the government may use artifice, stratagem, and undercover agents in its pursuit of criminals. United States v. Myers, 575 F.3d 801 (8th Cir. 2009)
6. Permitted Inducements. Some inducements are unlikely to tempt a law-abiding person to commit a crime. Such inducements are so mild that courts generally condone their use. Some examples:
- a. Use of deception: United States v. Engler, 806 F.2d 425 (3d Cir. 1986).
 - b. Use of decoys (e.g., metal deer to catch poachers).

- c. Payment of reasonable amount of money. Note that in the ABSCAM cases a \$50,000 bribe was held to be reasonable as was a proposed \$70,000 profit for Senator Williams.
 - d. Assistance in facilitating the commission of the crime by providing equipment or supplies (e.g., paper for counterfeiting) or products (e.g., chemical for drug manufacture).
- 7. "Prohibited" inducements. Some inducements are so coercive that their use jeopardizes any chance of successful prosecution. These may create at least the appearance-- and sometimes the reality-- of outright duress. Threats against the well-being of the target's family in order to convince the target to agree to the proposed commission of a crime are one example. Other examples include:
 - a. Extreme appeals to the sympathy or emotions of the person solicited. The Sherman case, taken to extremes, suggests an example.
 - b. Offers of substantial, unreasonable amounts of money to an impoverished or financially desperate target. United States v. Dion, 762 F.2d 674 (8th Cir. 1985).
 - c. Continual pressure on the target, such as repeated phone calls, visits, requests, etc.
 - d. Repeated insistence, badgering or soliciting. Jacobson v. United States, 503 U.S. 540 (1992).
 - e. Violent demonstrations, threats, and animal cruelty. United States v. Skarie, 971 F.2d 317 (9th Cir. 1992) (impaling live chicken).
- 8. Inducements by middlemen and informants:
 - a. The extent of direction and supervision provided by Private Inducement: Entrapment occurs only when the criminal conduct was the product of the activity of law enforcement officials. This means that entrapment cannot result from the inducements of a private citizen but must be the product of conduct by governmental agents.

- b. Inducements offered by Government Informers: On the other hand, when non-Government persons are recruited and then targeted against suspects by LEO, their activities will amount to Government inducement. In some cases, the private party is clearly an “agent” of the Government. Sometimes, however, the relationship between LEO and private parties is hazy. Whether the private party’s activities constitute government inducement in such cases will depend on factors like:
 - 1) LEO to the private party’s actions.
 - 2) The degree to which targets are pre-selected by LEO.
 - 3) The history of similar prior operations by the private party and LEO.
 - 4) The extent to which operational resources are made available to the private party by LEO.
 - 5) The degree to which a successful operation results in some tangible reward to the private party from LEO.

D. EPO #10: IDENTIFY WHEN PREDISPOSITION NEGATES AN APPARENT ENTRAPMENT DEFENSE.

- 1. Predisposition in general:
 - a. Where a person already has a readiness and willingness to break the law, the mere fact that government agents provide what appears to be a favorable opportunity is not entrapment.
 - b. By predisposed, it is not meant that the defendant on his own, under some conceivable set of circumstances, might commit the crime, but that he is presently ready and willing to commit the crime. Predisposition is a state of mind that readily responds to the opportunity furnished by the officer or his agent to commit the forbidden act for which the accused is charged.
 - c. If there is evidence of inducement considered sufficient to warrant an instruction, then the government must establish that the defendant was predisposed to commit the offense charged beyond a reasonable doubt. The sole issue would be whether the government carried its burden of proving the defendant was predisposed to violate the law before the government intervened. Jacobson v. United States, 503 U.S. 540 (1992).

- d. Use of other crimes evidence. Generally, evidence of earlier crimes or wrongdoing by the defendant is inadmissible in his criminal trial. Rule 404(a) F.R.E.
 - 1) But Rule 404(b) allows the use of evidence of "other crimes or acts "to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Courts have stated that the government may use such evidence to show predisposition.
- e. Use of Prior Convictions / Prior Arrests / Prior Criminal Activity:
 - 1) The courts have permitted the use of prior criminal activity in order to prove the predisposition of the defendant to commit the charged offense.
 - 2) Proof of prior illegal conduct is relevant to the issue of a defendant's predisposition to commit a crime. The issue is whether the defendant's involvement in a prior criminal act is sufficiently similar to the act charged in the indictment. If this requirement has been satisfied, then past acts leading up to the criminal activity are admissible to show knowledge, motive, and intent on the part of the defendant to participate in the crime charged.
- f. Use of Post-Crime Criminal Activity:
 - 1) Predisposition rests on a defendant's mental state prior to commission of the crime. But that mental state can be shown by what the defendant did or said either before or after commission of the crime charged. Thus, evidence of continued drug dealing by a defendant after his indictment for earlier drug deals was admissible to prove his predisposition once he contended that he had been entrapped.... United States v. Moschiano, 695 F.2d 236, 243-244. (7th Cir. 1982).
 - 2) A statement made by the defendant to an undercover agent that he would be willing to get more drugs for the agent ("if you need more I'll be here") was admissible to show his predisposition. United States v. Jenkins, 480 F.2d 1198, 1200 (5th Cir. 1973), cert. denied, 414 U.S. 913 (1973).

- 3) "The primary thrust of these authorities is that evidence of a similar offense, committed in close proximity of time, may be corroborative of a prior or subsequent offense. Although evidence introduced in a criminal trial generally should relate only to the specific offense charged, prior or subsequent incidents may be introduced to establish that a defendant possessed the requisite knowledge or that there is a consistent pattern, scheme of operations, or similarity of method." United States v. Rodriguez, 474 F.2d 587, 590 (5th Cir. 1973).
 - 4) "The question in each case is not whether the events at issue occurred before, during or after commission of the alleged offense. The question is whether the events are relevant to and probative of the defendant's willingness to commit the crime charged when first solicited to do so by a government agent." United States v. Brown, 567 F.2d 119, 120 (D.C. Cir. 1977).
- g. Use of Statements to establish predisposition:
- 1) Conversations with the defendant can be very important during an undercover investigation in proving his predisposition. Whenever possible, encourage the defendant to talk or brag about his criminal enterprise.
 - 2) In United States v. Hill, 626 F.2d 1301, 1302 (5th Cir. 1980), Hill boasted to the undercover agent "of his long-time involvement in procuring and selling stolen vehicles, of the quality of his wares, and the reliability of his operation, and of his past success in avoiding prosecution."
- h. Defendant's ready acceptance:
- 1) Courts have placed heavy emphasis on the defendant's ready acceptance of the offered inducement. In United States v. Reynoso-Ulloa, 548 F.2d 1329, 1336 (9th Cir. 1977) the court said "...while none of the factors alone indicates either the presence or absence of predisposition, the most important factor...is whether the defendant evidenced reluctance to engage in criminal activity which was overcome by repeated Government inducement."

- 2) In other cases, the defendant's predisposition was proven by:
 - a) an "unbridled enthusiasm for his "new career". United States v. Anderton, 679 F.2d 1199, 1201 (5th Cir. 1982).
 - b) "I'm no Boy Scout." United States v. Myers, 692 F.2d 823, 836 (2d Cir. 1982) (one of the **Abscam** cases).
- 3) A "ready response" reveals that the defendant was a willing participant and not one that had merely succumbed to the seduction of the LEO's inducement.

E. EPO #11: IDENTIFY AND APPLY THE ELEMENTS OF TITLE 18 U.S.C. §1001 (FALSE STATEMENTS).

1. The Statute. Title 18 U.S.C. §1001 provides as follows:
 - a. Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
 - 1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
 - 2) makes any materially false, fictitious, or fraudulent statement or representation; or
 - 3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
 - 4) shall be fined under this title or imprisoned not more than five years or, if the offense involves international or domestic terrorism, fined or imprisoned 8 years, or both.
 - b. Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.
 - c. With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to...

- 1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or
 - 2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.
2. Elements of Title 18 U.S.C. §1001. The following elements must be proven in order to establish that a violation of § 1001 has occurred:
 - a. Whoever ...
 - b. Regarding certain Federal matters...
 - c. Knowingly and willfully...
 - d. Makes a false material statement, or makes or uses a false writing or document knowing it to contain a material false statement, or conceals or covers up a material fact...
 - e. *shall be fined/imprisoned up to five years.*
3. "Regarding Certain Federal Matters." False statements (oral or written), whether or not legally required to be made, which are made in a matter within the jurisdiction of the executive, legislative, or judicial branches of the United States are violations of § 1001. United States v. Arcadipane, 41 F.3d 1 (1st Cir. 1994). Courts have also upheld convictions under this section where individuals have made false statements to state agencies that are recipients of Federal funds.
 - a. The False Statements Accountability Act of 1996. Title 18 U.S.C. §1001 applies to all three branches of the Federal government. In Hubbard v. United States, 514 U.S. 695 (1995), the Supreme Court had held that a Federal court was neither a "department," nor an "agency," within the meaning of § 1001. The Court also noted that these terms applied to Executive Branch agencies alone, as was originally intended. However, the 1996 Act overruled the Court's interpretation in Hubbard, with the following limitations:

- 1) That section (a) of the Act does not apply to a party or their counsel during a judicial proceeding for any statements, representations, writings or documents submitted by them to a judge or magistrate in that proceeding. Thus, non-parties could still be prosecuted for false statements made during a judicial proceeding, as could a party for false submissions made during administrative housekeeping matters, such as submissions to the Office of Probation, bar membership admissions or other judicial entities (the Clerk of the Court, for example).
 - 2) That section (a) of the Act shall apply to matters within the jurisdiction of the legislative branch only if they relate to administrative matters or congressional investigations conducted consistent with applicable congressional rules.
- b. Administrative matters would include such things as financial disclosure filings, claims to the House Finance Office, and submissions to other legislative entities, such as the General Accounting Office, the Government Printing Office, the Library of Congress, the Office of the Inspector General of the House and the Capitol Police.
 - c. Duly authorized investigations or reviews are those activities initiated through a formal action of a House or Senate committee, or the whole House or Senate. Inquiries by members of Congress or their staff would not be a duly authorized investigation under § 1001.
 - d. Examples. The following examples are provided for illustrative purposes.

- 1) United States v. Sheets, 65 F.3d 752 (8th Cir. 1995). Following an on-the-job dispute with fellow employee Quinn Hancock, Sheets filed a false amended tax return in Hancock's name. The amended return reported \$390,000 in unreported gambling revenue, which subjected Hancock to an additional tax liability of \$103,697.90. After Hancock eventually convinced the IRS that the claim was bogus, the IRS focused on Sheets. Sheets denied filing the amended tax return, furnished a disguised handwriting sample, and altered the typewriter he used to type the return before turning it over to the police. Sheets pled guilty to a two-count indictment for his false statements to the IRS.
- 2) United States v. Haggard, 41 F.3d 1320 (9th Cir. 1994). Several years after an 8-year-old girl was abducted near her home in Hayward, California, Haggard contacted the FBI and claimed to know of the location of her body and the identity of her assailant. Haggard was serving time in Indiana for burglary. During several interviews with the FBI, Haggard recounted his story, and the FBI declined to pursue the case. Upset, Haggard wrote to the San Francisco Chronicle, claiming to know the location of her body, her assailant's identity, and wanting to put the child's parents at ease and allow them to give the child a proper burial. The FBI called his bluff, and brought him to testify before a grand jury. The next day, Haggard led the FBI on a 4-hour, 100-mile wild goose chase around the Bay area. At the end of the trip, Haggard admitted he made the whole thing up, purportedly to seek favorable treatment with the Indiana Parole Board. As expected, when his hoax was revealed, the impact on the family of the missing girl was traumatic. After being indicted on 11 Federal counts, Haggard pleaded guilty to obstructing an FBI investigation, two counts of false statements to the FBI, obstructing justice by giving false testimony to a grand jury, and two counts of false statements to a grand jury. He received 78 months imprisonment, and a nominal fine and restitution.

- 3) United States v. Massey, 550 F.2d 300 (5th Cir. 1977). The defendant called the FBI on the telephone and later met with an agent. Massey told the agent that he knew of a plot to kill President Ford and Senator Ted Kennedy. The information was unsworn, oral and unrecorded. The FBI commenced an investigation and later discovered that Massey had lied. He was convicted of violating § 1001.
 - 4) United States v. Lambert, 501 F.2d 943 (5th Cir. 1974)(en banc), abrogated by United States v. Rodriguez-Rios, 14 F.3d 1040 (5th Cir. 1994)(en banc) as to "exculpatory no" doctrine. Lambert visited the Tampa FBI office and signed a written statement falsely stating that two Tampa Police Officers had arrested him without probable cause and had physically abused him. The FBI conducted an investigation and discovered the charge was an attempt to get back at the officers for his arrest. He was convicted of violating § 1001.
 - 5) United States v. Adler, 380 F.2d 917 (2d Cir. 1967), cert. denied, 389 U.S. 1006 (1967). The defendant, a contractor at a Navy submarine base, voluntarily visited the FBI and orally stated that government officials were bribing him. The FBI commenced an investigation and later discovered, and Adler admitted, that he had falsely incriminated the government officials because the officials were too tough on him. He was convicted of violating § 1001.
 - 6) United States v. Herring, 916 F.2d 1543 (11th Cir. 1990). The defendant falsely applied for and received unemployment benefits from Georgia. He claimed the federal government lacked jurisdiction to prosecute under § 1001. Georgia received federal dollars to help pay the administrative costs of its unemployment program and the program was overseen by the U.S. Secretary of Labor. Therefore, jurisdiction was appropriate and the defendant's conviction upheld.
4. Statements Regarding Criminal Acts. False statements made to a Federal agency by a "witness/informant" about alleged criminal acts are within the jurisdiction of the agency.

- a. United States v. Shanks, 608 F.2d 73 (2d Cir. 1979), cert. denied, 444 U.S. 1048 (1980). An employee (the eventual defendant) made deliberate false statements to investigators that briefly focused Secret Service attention on an innocent employee.
 - b. Sica v. United States, 325 F.2d 831 (9th Cir. 1963), cert. denied, 376 U.S. 952 (1964). The IRS was investigating the tax liability of Cohen, who was involved in the cigarette vending machine business in the Los Angeles area. There was stiff competition between the vending machine companies. The IRS was able to prove that Cohen gave Sica \$5,000 in cash for his services in locating sites for the vending machines. The IRS interviewed Sica and informed him it was investigating Cohen. Sica denied in writing that he had ever accepted money from Cohen. Sica was later convicted of violating § 1001. Also, note the similarity between this violation by a witness and a violation of Title 18 U.S.C. § 4 (Misprision of Felony). The defendant gave a written false statement to the FBI intended to conceal her husband's participation in a bank robbery. United States v. Pittman, 527 F.2d 444 (4th Cir. 1975), cert. denied, 424 U.S. 923 (1976).
5. Statements Regarding Regulatory Functions. False statements made to an agency regarding the regulatory functions of a Federal department or agency.

- a. United States v. Seay, 718 F.2d 1279 (4th Cir. 1983), cert. denied, 467 U.S. 1226 (1984). The defendant's husband died in 1950 while on active duty with the U.S. Army. She received benefits from the FECA (Federal Employees Compensation Act) for herself and four children. The defendant received forms stating that she would receive compensation as a widower until she died or remarried. In 1962, she moved in with Mr. Coke Seay and they lived together for 19 years. During that time, she changed her church membership and they both joined the same church as Mr. and Mrs. Coke Seay. They appeared in the church pictorial directory as "Mr. and Mrs. Coke Seay." The minister later testified at trial that the church members considered them to be married. Each year the Department of Labor sent the defendant a form, which she signed and failed to mention she was married. When the defendant discovered she was being investigated for making false statements, she moved out of Coke Seay's house and rejoined her old church. At trial the government was able to prove, that they were married under the common law and therefore she had lied on the forms sent to her by a Federal agency. She was convicted of violating § 1001.
- b. United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991). Poindexter was convicted on five felony counts based on the part he played as National Security Advisor in the "Iran/Contra" affair. During his one year in that position, Poindexter made assurances that national policy was in accordance with the House Resolution concerning National Security Council assistance to the Contras, while the opposite was true. He also arranged for Oliver North to testify to those assurances and destroyed a Presidential "finding" that authorized the exchange of missiles to Iran in return for the release of hostages. He also falsely testified before the House Intelligence Committee concerning his knowledge of the missile shipments from Israel to Iran. The convictions were eventually overturned based on the immunity issues arising from his and Oliver North's testimony before the Congress United States v. North, 910 F.2d 843 (North I), **modified**, 920 F.2d 940 (D.C. Cir. 1990)(North II), cert. denied, 500 U.S. 941 (1991).

6. Knowingly and Willfully – Intent. To be a violation under § 1001, the statement must be one that is capable of affecting the exercise of a governmental function. The intent must be to deceive or to mislead and done knowingly and willfully. It is not required that the intent be to defraud. Examples include:
- a. False certifications to GSA for nonconforming plastic bags. Company president ordered employees to short GSA, but did not personally sign certification statements. United States v. Fairchild, 990 F.2d 1139 (9th Cir. 1993), cert. denied, 510 U.S. 898 (1993).
 - b. False statements and documents sent to the IRS concerning a fraudulent land transaction were not spontaneous, emotional disclaimers, but were calculated and deliberately intended to influence the IRS; and if Duerr had not provided the information concerning the land transactions, the IRS would not have pursued the issue. United States v. Steele, 933 F.2d 1313 (6th Cir. 1991), cert. denied, 502 U.S. 909 (1991).
 - c. Accountant produced and gave to IRS auditor a charitable deduction he stated he had failed to file in previous tax year. Deduction was later proved false. United States v. Fern, 696 F.2d 1269 (11th Cir. 1983).
 - d. A defendant who deliberately avoids reading a form he is signing cannot avoid criminal prosecution for false statements contained on the form. By signing the form and not reading it the defendant acted with "reckless disregard of the truth," which has been held to satisfy the requirement of § 1001. United States v. Puente, 982 F.2d 156 (5th Cir. 1993).
 - e. Leaving a blank entry on a document is equivalent to an answer "none" or a statement that there are no facts required to be reported. If there are facts that should be reported, leaving a blank belies the certification that the information therein is "true and correct." Silence may be falsity when it misleads, particularly if there is a duty to speak. United States v. Mattox, 689 F.2d 531 (5th Cir. 1982)
7. Makes a False Material Statement or Conceals or Covers up a Material Fact. The false statement made by the defendant must be "material." The materiality of a statement is a mixed question of law and fact, and is one that should be decided by the jury. As described by the Supreme Court:

"[T]he statement must have a natural tendency to *influence, or be capable of influencing, the decision of the decision-making body to which it was addressed*. The Constitution gives the criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged. The trial judge's refusal to allow the jury to pass on the 'materiality' of Gaudin's false statements infringed that right."

United States v. Gaudin, 515 U.S. 506 (1995). **The test of materiality is whether the false statement has a natural tendency to influence agency action or is capable of influencing agency action.** United States v. Garcia-Ochoa, 2010 U.S. App. LEXIS 11938 (misrepresentations on an immigration form)...

- a. Oath or Affirmation. Under § 1001, a false statement is not required to be under oath or affirmation. See United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991).
- b. Form of the Statement. The false statement can be oral or written.
 - 1) United States v. Moore, 27 F.3d 969 (4th Cir. 1994)... Federal agents were investigating bank fraud by Moore and others. Moore was being interviewed by an FBI agent, a postal inspector, and two Assistant U.S. Attorneys where he denied his part in the preparation of false tax returns used by his client to obtain bank loans. Moore not only denied preparing the documents, but went on to say that he had not prepared any tax forms for the client, denied the handwriting on the form was his, but admitted the handwriting was similar to his. Moore then stated that he had never used the type of form that was being questioned.

- 2) United States v. Barr, 963 F.2d 641 (3rd Cir. 1992). Barr served as an Assistant to the Attorney General in Washington, D.C. for nine months. On Barr's SF-171 and SF-86, he answered "no" to questions concerning the use or possession of marijuana, narcotics, hallucinogenic, or other dangerous or illegal drugs. He was interviewed by the FBI as part of the security clearance procedure. After Barr resigned from his position, it was learned that Barr had used cocaine several times during the time period he had answered "no" to use of drugs in the SF-171, SF-86, and the FBI interview. He had also used cocaine while employed with the Attorney General. Barr was convicted of false statements and drug possession.
- 3) United States v. Berisha, 925 F.2d 791 (5th Cir. 1991). Berisha was preparing to board an international flight from Dallas - Ft. Worth when a customs inspector approached him and asked him if he was carrying more than \$10,000. Berisha twice stated he only had \$8,000 with him. The inspector later observed Berisha attempt to pass a roll of currency to a companion. The total amount of currency possessed by Berisha was over \$17,000. He was convicted of failing to report the currency and false statements.

8. The “Exculpatory No.” At one time, some circuits held that false “exculpatory no” statements made by a suspect to agents in a criminal investigation were not a violation of § 1001. An “exculpatory no” statement is a statement in which the suspect merely denies that he is guilty of the crime in which he is a suspect. Even if the statement was untrue (i.e., he did in fact commit the criminal act), such a statement could not be charged under § 1001. The leading decision of the “exculpatory no” doctrine originated from the Fifth Circuit in Paterno v. United States, 311 F.2d 298 (5th Cir. 1962), abrogated by United States v. Rodriguez-Rios, 14 F.3d 1040 (5th Cir. 1994)(en banc). Nevertheless, the United States Supreme Court put the “exculpatory no” issue to rest when it decided United States v. Brogan, 522 U.S. 398 (1998). In Brogan, the Court held that the plain language of § 1001 did not support any exception for an “exculpatory no” statement. The Court made it clear that, “[b]y its terms, § 1001 covers ‘any’ false statement...of whatever kind...including the use of the word ‘no’ in response to a question.” Justice Scalia emphasized that “...the Fifth Amendment does not confer a privilege to lie,” language that had been used by the Fifth Circuit in Rodriguez-Rios.
 - a. False “exculpatory no” statements made regarding an administrative or regulatory investigation never fell within the exception to §1001. False statements made to Federal investigators that relate to Federal regulatory functions of a department or agency can form the basis for Federal prosecution under § 1001. See United States v. Barr, 963 F.2d 641 (3rd Cir. 1992)(false entries on SF-171 and SF-86 for employment), and United States v. Berisha, 925 F.2d 791 (5th Cir. 1991)(false entry on Customs currency reporting form).
 - b. Congress addressed the “false exculpatory no” doctrine in the False Statements Accountability Act of 1996, by implicitly applying the doctrine in judicial proceedings where statements and other submissions to the court are made by the defendant or defendant’s counsel. The Department of Justice was concerned that adding any other proviso ending or extending the doctrine might delay the rest of the Act’s passage and invite new judicial interpretation.
9. Miscellaneous Statutes Related to § 1001:
 - a. Title 2 U.S.C. § 192 (Contempt of Congress).
 - b. Title 18 U.S.C. § 4 (Misprision of Felony).

- c. Title 18 U.S.C. § 287 (False, Fictitious or Fraudulent Claims).
- d. Title 18 U.S.C. § 1002 (Possession of False Papers to Defraud the United States).
- e. Title 18 U.S.C. § 1005 (Bank Entries, Reports and Transactions).
- f. Title 18 U.S.C. § 1015 (Naturalization, Citizenship, or Alien Registry).
- g. Title 18 U.S.C. § 1505 (Obstruction of Proceedings Before Departments, Agencies, and Committees).
- h. Title 18 U.S.C. § 1621 (Perjury).
- i. Title 18 U.S.C. § 1622 (Subornation of Perjury).
- j. Title 18 U.S.C. § 1623 (False Declarations Before Grand Jury or Court).
- k. If the false statement violates § 1001 and another statute [e.g., Title 26 U.S.C. § 7207 (False Statements to an IRS Agent)], the prosecutor may choose § 1001, even if the penalties are more severe.

IV. CONSPIRACY / PARTIES

A. RAPPORT AND OPENING STATEMENT

- 1. There are various conspiracy statutes in the United States Code (U.S.C.), but this course covers only the general criminal conspiracy statute, codified at Title 18 U.S.C. § 371.
- 2. The Supreme Court has often referred to the crime of conspiracy as “a partnership in crime.” United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150 (1940). As such, each conspirator, like a business partnership, is liable for virtually all acts and admissions of any co-conspirators.
- 3. The crime of conspiracy was created because of the inherent dangers posed to society when two or more individuals deliberately plot to violate the law. The Supreme Court has remarked on the dangers of a criminal conspiracy:

"It involves the deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered." United States v. Rabinowich, 238 U.S. 78 (1915).

4. The general approach to conducting a conspiracy investigation is to identify the members within the organization along with their respective roles for achieving the criminal objectives. Criminals attempt to conceal their plans and avoid detection so recruiting and developing witnesses is critical to any conspiracy investigation. Investigators will need to locate and obtain evidence to corroborate witnesses and support the theory of the case that the defendants were acting together in agreement, toward a common criminal objective.
5. A person who commits a crime is called the "principal" of the offense. However, a crime may involve persons who assist the one who actually performed the criminal act. Additionally, the Federal statute pertaining to "Principals" (Title 18 U.S.C. § 2) contains a subsection concerning those who "cause" a crime to be committed. Still others may be involved in assisting the principal in some manner after the crime has been committed. These individuals are referred to as "accessories after the fact." Finally, other individuals may have knowledge of a Federal crime, and commit an act that "conceals" the true nature of the crime. These individuals may be guilty of "misprision of felony."
6. The General Federal Conspiracy Statute. Title 18 U.S.C. §371 reads as follows:
 - a. "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.
 - b. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.
7. The Importance of the Statute. Title 18 U.S.C. §371 is a valuable tool for criminal investigators, and can often be used to great advantage.

- a. Pro-Active. Because the statute is pro-active in nature, criminals can be apprehended prior to any substantive criminal offense being committed (e.g., before the bank robbery attempt). United States v. Feola, 420 U.S. 671 (1975).
 - b. Peripheral Helpers. Under the conspiracy statute, persons who could not be convicted as a principal under 18 U.S.C. § 2 (because a crime was never actually consummated) may still be caught in the web of a conspiracy.
 - c. Insulated Leaders. In many criminal organizations, the leaders insulate themselves from those members whose actions are more visible, thus making them less likely to get caught. The law of conspiracy provides a method to reach beyond the visible layer and immobilize the entire organization.
 - d. Doctrine of Merger. The conspiracy to commit a crime is a separate and distinct offense from the crime being planned and does not merge with any completed crime. Pinkerton v. United States, 328 U.S. 640 (1946). Accordingly, a defendant may be convicted and sentenced both for conspiracy to commit a crime and for the substantive crime itself. Even if the same act established the facts for both offenses, it is not double jeopardy.
 - e. Inconsistent Verdicts. The law recognizes that inconsistent verdicts are often returned in criminal cases. The crime of conspiracy increases the chance that a defendant will be convicted of at least one charge. Thus, even when a defendant is acquitted of the substantive crime, he or she may still be convicted of the conspiracy charge. United States v. Hughes Aircraft Co., 20 F.3d 974 (9th Cir.), cert. denied, 513 U.S. 987 (1994). Alternatively, an individual may be convicted of the substantive offense, but acquitted of the conspiracy charge. United States v. Stevens, 909 F.2d 431 (11th Cir. 1990).
8. The Elements of Conspiracy. The crime of conspiracy under Title 18 U.S.C. § 371 has five (5) elements.
- a. Two or More Persons ...
 - b. Intentionally ...
 - c. Agree ...

- d. To Violate Federal Law or Defraud the United States Government ... and
 - e. Commit An Overt Act In Furtherance Thereof.
9. Completion of the Conspiracy. When all of the above elements are present, the conspiracy is said to be COMPLETE. This does not mean that the conspiracy is finished, only that all the elements for a chargeable offense are now present.

B. ENABLING PERFORMANCE OBJECTIVES (EPO)

- 1. EPO #12: Identify how many persons are needed to form a conspiracy.
- 2. EPO #13: Identify when knowledge and intent are sufficient to constitute a conspiracy.
- 3. EPO #14: Identify an agreement and its functions according to the provisions of Title 18 U.S.C. § 371.
- 4. EPO #15: Identify the function of an overt act in the crime of conspiracy.
- 5. EPO #16: Identify when a co-conspirator's statement may be used during the prosecution of a conspiracy.
- 6. EPO #17: Identify the limits of the withdrawer's or late joiner's criminal liability.
- 7. EPO #18: Identify when a person may be prosecuted for assisting another in the commission of a crime, in accordance with Title 18 U.S.C. §§ 2-4.

C. EPO #12: IDENTIFY HOW MANY PERSONS ARE NEEDED TO FORM A CONSPIRACY

- 1. Two or More Persons. The plain language of Title 18 U.S.C. §371 requires the participation of "two or more persons.". The more difficult question to be answered is not how many persons are required for the crime, but who can those persons be. When investigating a conspiracy case, it is particularly important to know who cannot be considered to be a conspirator to complete the two person requirement.
 - a. Undercover Agents.. Under §371, an agreement between only two persons, one of whom is an undercover government agent, cannot support a conspiracy conviction, in that the requisite plurality is not present. United States v. Pennell, 737 F.2d 521 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985).

- b. Confidential Informants. Informants working for the government are considered as an extension of the government, and, like undercover agents, cannot be counted as a person to satisfy the two-person requirement. An agreement between the defendant and at least one other non-government affiliated party must be proved.
- c. Partnerships. Unlike corporations, a partnership may not be named in the indictment as a conspirator, even where the conspiracy was intended to benefit the partnership. Nonetheless, the individual partners may be indicted for their participation in the conspiracy.

In addition, there are several categories of individuals who may or may not be considered as one of the necessary two or more persons.

- d. Mentally Ill Persons. Similar to undercover agents, if a mentally ill individual is not capable of forming the requisite intent to commit the crime, they may not be one of the required "two or more persons" necessary for a conspiracy conviction under § 371. United States v. Phillips, 630 F.2d 1138 (6th Cir. 1980).
- e. Minors. Minors may constitute one of the necessary "two or more persons." However, each case must be considered based on the circumstances present in each particular case, considering the age of the minor, their intellect, their education, etc.
- f. Landlords and Tenants. A landlord does not automatically become a co-conspirator simply because he or she has knowledge that a tenant is utilizing the property for criminal activities. Instead, it must be shown that the landlord was a party to the agreement. This can be done by showing that the landlord had a stake in the outcome of the conspiracy, above and beyond collecting the normal rent for the property. If this cannot be shown, the landlord may still be guilty under Title 18 U.S.C. §2 (Principals), discussed later in this lesson plan.

- g. Buyers and Sellers as Conspirators. A merchant need not abstain from engaging in his lawful business simply because his customer is engaged in an illegal activity. United States v. Falcone, 311 U.S. 205 (1940). Knowledge of the part of the seller is not enough, standing alone, to make him or her a conspirator. The seller must also have the necessary intent to assist the criminal venture. For example, where a merchant charges more for the merchandise purchased for use in the criminal activity, the additional profits show that the seller has a stake in the outcome of the illegal venture. Direct Sales Co. v. United States, 319 U.S. 703 (1943).

Also, be aware of the following categories in determining the two or more persons requirement.

- h. Husbands and Wives. While considered a single "person" at common law, the Supreme Court has taken a different view, recognizing that a husband and wife may conspire with one another. United States v. Dege, 364 U.S. 51 (1960).
- i. Employers and Employees as Co-Conspirators. If an employee is aware that his or her work-related duties are contributing to a criminal venture on the part of his employer, the employee may be held liable as a conspirator.
- j. Attorneys. An attorney may become a co-conspirator by providing advice to conspirators, if the attorney provides the advice before or during the commission of the conspiracy; the attorney has knowledge of the conspiracy; and the attorney intends to assist the conspiracy in attaining its ultimate objective(s).
- k. Corporations. A corporation may be indicted for the crime of conspiracy in certain instances. Specifically, where there are two "real" people, one of whom is authorized to act on behalf of the corporation (e.g., a chief executive officer), and the conspiracy is formulated to benefit the corporation, both the individual conspirators and the corporation may be indicted.
- l. Consistency of Convictions
 - 1) Traditional Rule. Traditionally, the "Rule of Consistency" provided that, if co-conspirators were tried in a single trial, a sole co-conspirator could not be found guilty of conspiracy under §371, if all other co-conspirators were acquitted.

- 2) Recent Developments. The majority of the federal Courts of Appeal no longer follow the traditional rule. Therefore, the conviction of a co-conspirator may be upheld, even if all other co-conspirators were acquitted of the conspiracy charge in the same trial.
- 3) Multiple Trials. The “Rule of Consistency” is inapplicable in cases where co-conspirators are tried in separate trials, based on the fact that different juries may hear different evidence.

D. EPO #13: IDENTIFY WHEN KNOWLEDGE AND INTENT ARE SUFFICIENT TO CONSTITUTE A CONSPIRACY

1. General Concepts. In a conspiracy prosecution, the government must prove that the defendant had knowledge of the conspiracy and intended to participate in it.
2. Knowledge. To be a co-conspirator, an individual must know of the conspiracy’s existence and its overall plan or purpose.
 - a. Knowledge Regarding Co-Conspirators. While the defendant in a conspiracy case must know at least one other person involved in the conspiracy, there is no requirement that the defendant know the identity, number, or role of all co-conspirators involved in the plan. Blumenthal v. United States, 332 U.S. 539 (1947).
 - b. Knowledge Regarding Details of the Plan. Secrecy and concealment are essential features of a successful conspiracy. Accordingly, there is no requirement that the defendant know all of the details of the conspiracy. Blumenthal, *supra*.
 - c. Reasonably Foreseeable Acts. The reasonably foreseeable acts of one co-conspirator, committed in furtherance of the overall plan of the conspiracy, are attributable to all other co-conspirators. Pinkerton, *supra*.
3. Intent. The government must show that the defendant intended to participate in the conspiracy. In most cases, a defendant’s intent must be inferred from the circumstances and proven through circumstantial evidence. In making this determination, courts will look at “the defendant’s relationship with other members of the conspiracy, the length of association between the members, the defendant’s attitude and conduct, and the nature of the conspiracy.” United States v. Collazo, 732 F.2d 1200 (4th Cir. 1984), *cert. denied*, 469 U.S. 1105 (1985).

**E. EPO #14: IDENTIFY AN AGREEMENT AND ITS FUNCTIONS
ACCORDING TO THE PROVISIONS OF TITLE 18 U.S.C. §371**

1. General Concepts. The essence of any conspiracy is the agreement itself. Two or more persons must agree to work together towards the accomplishment of a common goal. The government must prove the existence of an agreement in order to successfully prosecute conspirators under §371.
2. Proving the Agreement. An agreement may be proven through circumstantial evidence. The agreement does not have to be put into words, either oral or written. United States v. Armstrong, 16 F.3d 289 (8th Cir. 1994). In fact, an agreement may be inferred from all of the facts and circumstances. Hamling v. United States, 418 U.S. 87 (1974).
3. Number of Conspiracies. To determine whether more than one conspiracy exists, the crucial factor is the number of agreements. United States v. Kearney, 560 F.2d 1358 (9th Cir. 1967), cert. denied, 434 U.S. 971 (1977). One agreement results in only one conspiracy, even though the agreement encompasses several unlawful acts. In determining the number of conspiracies in existence, courts will examine the nature of the scheme; the identity of the participants; the quality, duration, and frequency of each conspirator's transactions; and the commonality of time and goals. United States v. Cambindo-Valencia, 609 F.2d 603 (2d Cir. 1979), cert. denied, 446 U.S. 940 (1980).
4. Objects of the Agreement. In order to prosecute a defendant under § 371, either the object of the agreement or the means to accomplish the object must (1) be a crime against the United States or (2) tend to defraud the United States. The objective of the conspiracy does not have to be a crime. Hammerschmidt v. United States, 265 U.S. 182 (1924). It is sufficient to show that the contemplated objective would "impede, impair, defeat, or obstruct the proper functions of the United States Government."
 - a. Legal Objective/Illegal or Fraudulent Means. The objective of the conspiracy may be entirely legal, but the means of accomplishing it violate Federal law. For example, if the objective of the conspirators is to open their own restaurant, but they rob banks in order to obtain the funds, a conspiracy charge will lie.

- b. Illegal or Fraudulent Objective/Legal Means. In this situation, the objective of the conspiracy is illegal (such as committing arson of a Federal building), but the means of accomplishing it are perfectly legal (such as buying matches and gasoline). Because the objective is a violation of Federal law, a conspiracy charge can be brought.
 - c. Illegal or Fraudulent Objective and Means. In this situation, both the objective and the means of accomplishing it are illegal, such as when individuals steal weapons to use in a bank robbery. In such a case, a conspiracy charge would be proper.
5. Factual Impossibility. Even though it may be factually impossible to accomplish the objective of the conspiracy, this is not a defense to a prosecution under § 371. United States v. Recio, 537 U.S. 270 (2003); United States v. Giry, 818 F.2d 120 (1st Cir.), cert. denied, 484 U.S. 855 (1987).

F. EPO #15: IDENTIFY THE FUNCTION OF AN OVERT ACT IN THE CRIME OF CONSPIRACY

- 1. General Concepts. The final element that must be proven in any conspiracy prosecution under §371 is that, following the agreement, one of the conspirators committed an overt act in furtherance of the agreement.
- 2. Definition. An "overt act" is any act by a conspirator that tends to assist in the accomplishment of the overall plan of the conspiracy.
- 3. Purposes of the Overt Act. The overt act serves three important purposes.
 - a. Completes the Crime of Conspiracy. Once an overt act is committed by one of the conspirators, the crime of conspiracy has been completed, irrespective of whether the ultimate goal of the conspiracy is ever committed.
 - b. Withdrawal. Since the crime of conspiracy is not actually complete until there has been an overt act, the overt act provides a demonstrable point in time before which an individual may withdraw from the agreement without incurring criminal liability under §371.

- c. Proof of Intent. The overt act demonstrates that the conspirators have moved from thinking about the crime to actually acting on their agreement. In other words, an overt act shows that the agreement is not dormant, but that it is actively being pursued by the conspirators. Yates v. United States, 354 U.S. 298 (1957); overruled on other grounds by, Burks v. United States, 437 U.S. 1 (1978).
4. Number of Overt Acts Required. Only one overt act must be committed to complete the conspiracy. A single overt act committed by one conspirator is sufficient to complete the conspiracy for all members, including those who join the conspiracy after it has begun. United States v. Kissell & Harned, 218 U.S. 601 (1910).
5. Timing of the Overt Act. The overt act must occur after the agreement has been formed. An overt act performed prior to the agreement (sometimes termed a "preparatory act") may not be used to complete the crime of conspiracy.
6. Nature of the Overt Act. The overt act need not be criminal in nature, but may, in fact, be entirely lawful. Braverman v. United States, 317 U.S. 49 (1942).

G. EPO #16: IDENTIFY WHEN A CO-CONSPIRATOR'S STATEMENT MAY BE USED DURING THE PROSECUTION OF A CONSPIRACY

1. General Concepts. Federal Rule of Evidence (Fed. R. Evid.) 801(d)(2)(E) provides, in pertinent part, that: "A statement is not hearsay if ... the statement is offered against a party and is ... a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." Bourjaily v. United States, 483 U.S. 171 (1987).
2. Applying the Rule. Under Fed. R. Evid. 801(d)(2)(E), everything said, done, or written by a conspirator during the existence of the conspiracy and in execution or furtherance of the conspiracy is admissible against all co-conspirators. When determining whether a co-conspirators statement is admissible under this rule, the following five (5) questions must be asked:
 - a. Was There a Conspiracy?
 - b. Was the Defendant a Member of the Conspiracy?
 - c. Was the Person Who Made the Statement a Member of the Conspiracy?
 - d. Was the Statement Made During the Conspiracy?

- e. Was the Statement Made In Furtherance of the Conspiracy?
3. Analyzing the Responses. If the answer to each of the above questions is "yes," then the statement is admissible under Fed. R. Evid. 801(d)(2)(E). However, if the answer to any of the above questions is "no," then the statement is not admissible under this rule, although it may be admissible under another exception or exclusion to the hearsay rule. Bourjaily, supra. Moreover, even though the statement is admissible, a co-conspirators statement standing alone is not sufficient to prove the existence of the conspiracy or that the declarant or the defendant is a member of a conspiracy. Fed. R. Evid. 801(d)(2)(E)

H. **EPO #17: IDENTIFY THE LIMITS OF THE WITHDRAWER'S OR LATE JOINER'S CRIMINAL LIABILITY**

1. General Concepts. The law recognizes that someone may join or withdraw from a conspiracy after it has begun. Those who join the conspiracy after it has begun are referred to as "late joiners," while those who leave the conspiracy after it has begun are referred to as "withdrawers."
2. Late Joiners
 - a. Criminal Liability. "Late joiners" are criminally liable not only for conspiracy, but for any reasonably foreseeable crimes committed by his co-conspirators while the "late joiner" is a member of the conspiracy, to include the ultimate goal of the conspiracy if it is a criminal offense. However, "late joiners" are not criminally responsible for any acts of co-conspirators committed prior to their joining the conspiracy. Levine v. United States, 383 U.S. 265 (1966). Nonetheless, the prior acts of the co-conspirator's are admissible at the trial of the "late joiner" in order to show that there was actually a conspiracy in existence for the "late joiner" to join. United States v. G.M. Corporation, 121 F.2d 376 (7th Cir. 1941), cert. denied, 314 U.S. 618 (1941).
 - b. A late comer may be convicted of conspiracy even if she did not learn of the crime at its inception, but knowingly assisted at a later stage. United States v. Figueroa-Cartagena, 2010 U.S. App. LEXIS 14619
 - c. Effect on Conspiracy. The addition of a new conspirator does not create a new conspiracy.

- d. No Additional Overt Act Required.. The addition of a new conspirator does not require that an additional overt act be performed after the “late joiner’s” addition.
- 3. Withdrawers.. A commonly utilized defense to a conspiracy charge is withdrawal.
 - a. Criminal Liability.. A conspirator who withdraws from a conspiracy is liable for the crime of conspiracy, as well as any reasonably foreseeable crimes committed by his co-conspirators while he was a member of the conspiracy. Only by withdrawing from the agreement prior to the overt act can an individual entirely avoid liability for a conspiracy charge. Once a valid withdrawal occurs, however, the withdrawing conspirator will escape liability for any subsequent criminal acts of the remaining conspirators. United States v. Richardson, 939 F.2d 135 (4th Cir. 1991), cert. denied, 502 U.S. 1061 (1992).
 - b. Requirements. There are two (2) requirements that must be met for a conspirator to validly withdraw from a conspiracy.
 - 1) Affirmative Act. The first requirement the defendant must prove to establish a valid withdrawal from a conspiracy is that he or she took some affirmative act(s) inconsistent with the goals of the conspiracy.. Unless the defendant produces affirmative evidence of withdrawal, his or her participation is presumed to continue.. Hyde v. United States, 225 U.S. 347 (1912).
 - 2) Communication.. The affirmative act of withdrawal must be communicated in a manner reasonably calculated to reach at least one other co-conspirator or law enforcement. United States v. United States Gypsum Co., 438 U.S. 422 (1978).
 - c. Mere Cessation of Activity. Withdrawal from a conspiracy requires more than simply cessation of participation in the conspiracy.. United States v. Barsanti, 943 F.2d 428 (4th Cir. 1991), cert. denied, 503 U.S. 936 (1992).
 - d. Burden.. The burden of proving a valid withdrawal rests with the defendant.

- e. Effect on Conspiracy. The withdrawal of a single conspirator does not terminate the conspiracy or change the status of the remaining conspirators, unless the required “two or more persons” are no longer present (such as the withdrawal of a single conspirator from a two-person conspiracy).

I. EPO #18: IDENTIFY WHEN A PERSON MAY BE PROSECUTED FOR ASSISTING ANOTHER IN THE COMMISSION OF A CRIME, IN ACCORDANCE WITH TITLE 18 U.S.C. §§2-4.

- 1. Title 18 U.S.C. §2(a). Title 18 U.S.C. §2 is actually entitled “Principals.” Pursuant to this statute, individuals who provide assistance to a principal either before or during the commission of a crime may be held criminally liable as if they themselves had committed the offense. The statute is actually broken into two (2) subsections. The first part of the statute, subsection §2(a), deals with “aiding and abetting” a crime, and reads as follows:

“Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.”

- a. Liability of Defendant. It is important to remember that, if an individual is found guilty of being an “aider and abettor,” he or she may be punished as if they had committed the crime themselves (i.e., as if they themselves were the principal of the offense).
- b. The Elements of Aiding and Abetting. There are three (3) elements necessary to prove a crime under subsection § 2(a).
 - 1). Affirmative Act of Association. The statute requires that a defendant actually do something to assist in the commission of the crime.
 - a) Definition. An “affirmative act of association” has been defined as follows: “In order to aid and abet another to commit a crime, it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, and that he seek by his action to make it succeed.” United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).

- b) Timing. The affirmative act of association must occur either before or during the commission of the crime by the principal. An individual who arrives on the scene after the offense has ended cannot be held liable as an aider and abettor. However, when the criminal conduct extends over a period of time, a latecomer may be convicted of aiding and abetting even if she did not learn of the crime at its inception but knowingly assisted at a later stage while the crime was still being committed. United States v. Figueroa-Cartagena, 2010 U.S. App. LEXIS 14619. If the act occurs after the commission of the crime, the defendant may be held liable as an “accessory after the fact,” discussed more below.
 - c) Mere Presence. The defendant is not required to be present at the time the crime is committed to be liable under § 2(a). Hume v. United States, 118 F. 689 (5th Cir. 1902), cert. denied, 189 U.S. 510 (1903). Further, mere presence at the scene of the crime, even in the presence of the principal, does not, standing alone, make an individual an aider and abettor. United States v. Williams, 341 U.S. 58 (1951).
- 2) Knowledge. In addition to an affirmative act of association, the defendant must also have knowledge that he or she is assisting in the commission of a crime.
- a) Detail Required. There is no requirement that the defendant know all of the details of the crime. Williams v. United States, 308 F.2d 664 (9th Cir. 1962). However, where an individual unknowingly provides assistance to a principal, a prosecution under § 2(a) will not lie.

- b) Willful Blindness. Deliberate avoidance of knowledge will not preclude a finding of knowledge. This occurs when a defendant asserts a lack of guilty knowledge, but the evidence supports an inference that he or she instead chose to intentionally avoid gaining knowledge about the circumstances surrounding their assistance in order to avoid liability. United States v. Gruenberg, 989 F.2d 971 (8th Cir. 1993).
 - 3) Commission of an Offense Against the United States. In order to prosecute an individual as a principal under 18 U.S.C. 2(a), a crime must actually be committed. United States v. Provenzano, 334 F.2d 678 (3d Cir.), cert. denied, 379 U.S. 497 (1964).
 - a) Conviction of Principal. A defendant may be convicted under § 2(a) even though the person who actually committed the crime is never convicted, caught, or even identified. United States v. Untiedt, 493 F.2d 1056 (8th Cir.), cert. denied, 419 U.S. 862 (1974).
 - b) Charging the Crime. When an individual is charged with aiding and abetting, the indictment need not specifically charge “aiding and abetting.” United States v. Armstrong, 909 F.2d 1238 (9th Cir.), cert. denied, 498 U.S. 870 (1990). Because those who aid and abet a crime are held liable as the principal of the crime, the indictment would charge the defendant with the completed offense (e.g., bank robbery).
- 2. Title 18 U.S.C. §2(b). The second subsection of the statute, §2(b), addresses those individuals who intentionally cause another person to commit an offense against the United States. This subsection reads as follows:

“Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal.”

 - a. The Elements of “Causing.” There are three (3) elements necessary to prove a crime under subsection § 2(b).

- 1) An Act. The defendant must cause another to perform some act that, if directly performed by the defendant or another, would be a crime. United States v. Kelley, 395 F.2d 727 (2d Cir.), cert. denied, 393 U.S. 963 (1968).
 - 2) Intentional. Further, the defendant must intentionally cause the other to perform the act.
 - 3) Offense Against the United States. Finally, the defendant must cause the other to perform an act that is an offense against the United States.
- b. Additional Concepts
- 1) Mere Presence. A prosecution under §2(b) does not require that the defendant be present at the time the criminal act occurs.
 - 2) Knowledge. Further, there is no requirement under § 2(b) that the defendant actually know the individual who commits the crime.
 - 3) Conviction of Other Person. Finally, there is no requirement under §2(b) that the person who actually committed the crime be convicted before the defendant can be convicted.
 - 4) Charging. As with §2(a), the defendant need not specifically be charged in the indictment with "causing" another to commit the crime, but only with the completed offense.
3. Title 18 U.S.C. §3. Title 18 U.S.C. §3 is directed at those individuals who provide assistance to the principal of a crime following the commission of the crime. The statute provides as follows:
- "Whoever, knowing that an offense against the United States committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact."

- a. Liability of Defendant. "Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or ... fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by life imprisonment or death, the accessory shall be imprisoned not more than 15 years."
- b. The Elements of Accessory After the Fact. There are three (3) elements necessary to prove a crime under §3.
 - 1) Crime Must Be Committed. First, a crime must actually be committed before a defendant can be found guilty of violating 18 U.S.C. §3. Whether the crime was a felony or misdemeanor is irrelevant.
 - 2) Knowledge. Second, the defendant must have knowledge that a crime has been committed, although he or she need not know the precise nature of the crime. United States v. Balano, 618 F.2d 624 (10th Cir. 1979), cert. denied, 449 U.S. 840 (1980).
 - 3) Assistance to the Principal. Third, the defendant must willfully assist the principal so as to prevent or hinder the apprehension, trial or punishment of the principal.
- c. Additional Concepts
 - 1) Timing of the Assistance. A violation of § 3 can occur only after the crime has been committed. Government of the Virgin Islands v. Aquino, 378 F.2d 540 (3d Cir. 1967). A defendant who provides assistance to the principal before the crime or while the crime is in progress is guilty as an aider and abettor. United States v. Barlow, 470 F.2d 1245 (D.C. Cir. 1972).
 - 2) Conviction of the Principal. As with aiding and abetting, the conviction of the principal is not required to convict the defendant of violating §3. United States v. Walker, 415 F.2d 530 (9th Cir. 1969).

- 3) Silence as Assistance. An individual's silence may not be used to prove that the individual is an accessory after the fact. However, where an individual provides false or misleading statements to law enforcement officers, those statements may be used to prove the offense.
4. Title 18 U.S.C. §4. Title 18 U.S.C. §4 is directed at those individuals who have knowledge of a felony offense and take affirmative steps to conceal the crime and fail to disclose their knowledge to criminal investigators. As stated by one court, "misprision of felony" is the concealment of a felony without giving any degree of help to the individual who actually committed the crime." United States v. Perlstein, 126 F.2d 789 (3d Cir.), cert. denied, 316 U.S. 678 (1942). The statute reads as follows:

"Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both."

 - a. The Elements of Misprision of Felony. There are four (4) elements necessary to prove a crime under § 4. Lancey v. United States, 356 F.2d 407 (9th Cir.), cert. denied, 385 U.S. 922 (1966).
 - 1) Felony Committed. First, a felony must have been committed by the principal.
 - 2) Knowledge. Second, the defendant must have knowledge that the felony had been committed.
 - 3) Affirmative Act of Concealment. Third, the defendant must have performed either an affirmative act of concealment or an act that concealed the true nature of the crime.
 - 4) Failure to Disclose. Finally, the defendant must fail to disclose his knowledge of the crime as soon as possible.

- a) Mere Failure to Report. A simple failure to report a crime does not, without an affirmative act of concealment, make one guilty of misprision of felony. However, where an individual lies to or misleads criminal investigators, this element may be met. United States v. Pittman, 527 F.2d 444 (4th Cir. 1975), cert. denied, 424 U.S. 923 (1976).
- b) Self-Incrimination as a Defense. If the defendant is implicated in the crime committed by the principal, the right against compelled self-incrimination may provide a viable defense for a defendant accused of misprision of felony. Hoffman v. United States, 341 U.S. 479 (1951).
- b. Accessory After the Fact v. Misprision of Felony. There is a very close relationship between these two statutes. However, there are some differences that should be noted.
 - 1) Maximum Punishment. The maximum possible punishments for both offenses are different.
 - 2) Felony Required. By statutory definition, misprision of felony can only occur when a felony crime has been committed by the principal. On the other hand, accessory after the fact may be charged regardless of the severity of the principal's offense.
 - 3) Assistance to Principal. A defendant accused of being an accessory after the fact must intentionally assist the principal of the offense, while one accused of misprision of felony need only commit an act of concealment without necessarily intending to assist the principal.

J. ADDITIONAL TEACHING POINTS FOR THE CRIME OF CONSPIRACY / PARTIES

- 1. **Introduction.** The following additional teaching points may be made by the instructor, should time permit. These points deal with the statute of limitations, and venue for a conspiracy charge and attempt to commit a crime. At the present time, these additional teaching points are not testable material.
- 2. **Statute of Limitations.** Pursuant to Title 18 U.S.C. §3282, the statute of limitations for the crime of conspiracy is five (5) years.

- a. Running of the Statute. The statute of limitations begins to run from the date the conspiracy is terminated, which could result from a variety of situations, such as consummation of the objective or abandonment. Typically, however, the statute of limitations begins to run from the date the last overt act was committed in furtherance of the conspiracy. Fiswick v. United States, 329 U.S. 211 (1946); United States v. Bornman, 559 F.3d 150 (3d Cir. 2009).
 - b. Continuing Concealment of the Conspiracy. An agreement among the conspirators to conceal a conspiracy after its goals have been accomplished may, depending on the nature of the agreement, extend the running of the statute of limitations on the conspiracy charge. Grunewald v. United States, 353 U.S. 391 (1957).
 - c. Statute of Limitations on the Substantive Offense. The statute of limitations for any substantive offense committed by the conspirators begins to run from the date the offense was committed.
3. **Venue.** The Sixth Amendment requires that prosecution occur “in the State and District wherein the crime shall have been committed.”
- a. Venue for the Conspiracy Charge. Because the legal basis for a conspiracy charge is an agreement and an overt act in furtherance of that agreement, venue for a conspiracy charge can actually lie in two (2) separate locations.
 - 1) Agreement. Venue for the conspiracy charge will lie in the district where the agreement was entered into.
 - 2) Overt Acts. Venue for the conspiracy charge will also lie in any district in which any overt act in furtherance of the agreement was entered into. Further, since the overt act of one conspirator is considered to be the overt act of all, an overt act by one conspirator will establish venue for all conspirators in a single district, even in a district where the others were never physically present.
 - b. Venue for Substantive Offenses. If a substantive offense is committed, venue for that offense will lie in the district where the crime actually occurred.

- c. Title 18 U.S.C. §3238. If the substantive offense is not committed within any state or district (e.g., the high seas), venue will lie in the district where the offender was arrested or into which he or she was first brought.
- 4. **Attempt.** Federal law provides no statutory definition of attempt to commit a crime. Precedent, however, establishes that to prove an attempt, the government must show a defendant's intent to commit the proscribed criminal conduct together with the commission of an act that constitutes a substantial step towards the commission of the proscribed criminal activity. United States v. Pennyman, 889 F.2d 104 (6th Cir. 1989). Thus the crime of attempt requires proof of specific intent to complete the acts constituting the substantive offense, regardless of whether the choate offense is a general or specific intent crime.
 - a. Impossibility. Factual impossibility, that is, the defendant is unable to accomplish what he intends because of some facts unknown to him, is not a defense to an attempt charge.
 - b. Abandonment/Withdrawal. The Model Penal Code recognizes abandonment as an affirmative defense to attempt under circumstances manifesting a complete and voluntary renunciation of criminal purpose. However, circuits addressing this issue have ruled that after a defendant has evidenced the necessary intent and has committed an act constituting a substantial step toward the commission of the offense, he has committed the crime of attempt, and can withdraw only from the commission of the substantive offense. See, e.g. United States v. Shelton, 30 F.3d 702 (6th Cir. 1994).

V. OBSTRUCTION OF JUSTICE

A. RAPPORT AND OPENING STATEMENT

- 1. The obstruction of justice statutes are designed to protect the integrity of the entire federal court system, whether the proceedings are administrative and pending before a Federal agency; legislative and pending before Congress; or judicial and pending as civil, or criminal proceedings before any level of the Federal judiciary.
- 2. When viewed and used together, these statutes provide a federal criminal investigator with powerful weapons against any person who seeks to corrupt ongoing investigations and court proceedings, as well as possible future investigations.

3. This course will examine four specific provisions of the United States Code that pertain to obstruction of justice in regard to criminal investigations and proceedings.

B. ENABLING PERFORMANCE OBJECTIVES (EPO)

1. EPO #19: Identify conduct that can be prosecuted under Title 18 U.S.C. §§1503 and 1510.
2. EPO #20: Identify the groups of persons who are protected under Title 18 U.S.C. §§1512 and 1513.
3. EPO #21: Identify conduct that constitutes "tampering" in violation of Title 18 U.S.C. §1512 and conduct that constitutes "retaliation" in violation of Title 18 U.S.C. §1513.

C. EPO #19: IDENTIFY CONDUCT THAT CAN BE PROSECUTED UNDER TITLE 18 U.S.C. §§1503 AND 1510

1. Title 18 U.S.C. §1503. This statute was enacted to ensure that court proceedings would take place in an atmosphere that would be conducive to seeking and finding the truth, without fear of intimidation, coercion, or corruption.
2. The Statute. Entitled "Influencing or Injuring Officer or Juror. Generally," the statute provides as follows:

"(a) Whoever, corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede the due administration of justice, shall be punished as provided in subsection (b)..."
3. Title 18 U.S.C. §1503 serves to protect the individuals involved in the federal court system and the integrity of the system itself.

- a. Section 1503 can be broken down into two distinct parts... The first part of §1503 covers obstruction of justice by those who would tamper with, or retaliate against jurors or officers of the court. Officers of the court include judges, prosecutors, and defense counsel. Law enforcement officers are not covered under §1503 as officers of the court.
 - b. The second part of §1503 contains an omnibus clause, or catch-all provision that prohibits any conduct that would obstruct the due administration of justice... The omnibus clause allows prosecutions for obstruction of justice even if the defendant's actions were not specifically prohibited in § 1503, or if these actions were against individuals other than jurors and officers of the court, witnesses, for example. See United States v. Simmons, 591 F.2d 206 (3d Cir. 1979). The defendant was charged with two counts of obstructing justice under the omnibus clause of §1503. In one count he was charged after he destroyed documents that had been subpoenaed by the grand jury. In the second count he was charged after he instructed his employees to withhold information from the grand jury after they were subpoenaed to testify. The court held that in both instances the defendant's conduct obstructed the due administration of justice because it affected the ability of the grand jury to carry out its function. U.S. v. Rovetuso, 768 F.2d 809, 824 (7th Cir. 1985). (Section 1503 is violated when a defendant interferes with the due administration of justice by tampering with a witness).
4. The Elements of the Statute...
- a. For § 1503 Tampering:
 - 1). Whoever corruptly, or by threats, or force, or by any threatening letter, or communication,
 - 2). Endeavors to influence, intimidate, or impede,
 - 3). Any grand or petit juror, or officer in, or of , any court of the United States,
 - 4). In the discharge of his duty.
 - b. For §1503 Retaliation (juror):
 - 1). Whoever injures,

- 2) Any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him or on account of his being or having been such juror.
- c. For §1503 Retaliation (judge and officers of the court):
 - 1) Whoever injures,
 - 2) Any such officer, magistrate judge or other committing magistrate in his person or property on the account of the performance of his official duties.
- d. For §1503 (omnibus):
 - 1) Whoever, corruptly, or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes or endeavors to influence, obstruct, or impede,
 - 2) the due administration of justice.
5. Intent. The government must also prove that the defendant acted "corruptly," which is to say with an evil or wicked intent. United States v. Barfield, 999 F.2d 1520 (11th Cir. 1993). The action taken by the defendant must be with the intent to influence judicial or grand jury proceedings. United States v. Aguilar, 515 U.S. 593, 599 (1995) (holding that uttering false statements to an investigating agent who might or might not testify before a grand jury is not sufficient for §1503 liability). This is a "specific intent" crime, so if the intent cannot be shown, the crime cannot be charged. United States v. Bashaw, 982 F.2d 168 (6th Cir. 1992). To establish a violation of § 1503, the government must demonstrate that the defendant knew of the pending judicial proceeding and specifically intended to impede its administration. United States v. Guzzino, 810 F. 2d 687, 696 (7th Cir.).

6. Factual Impossibility. Whether the attempted obstruction of justice was successful is irrelevant for charging a violation of §1503. The statute proscribes the endeavor to influence or obstruct the administration of justice; thus the impossibility of accomplishing the goal of the obstruction of justice does not prevent a prosecution for the endeavor to accomplish such a goal. United States v. Bucey, 876 F.2d 1297 (7th Cir. 1989). (Defendant, with knowledge of the ongoing grand jury investigation and of the subpoena issued to the witness, counseled the witness on how to role-play his grand jury testimony with his attorney, and instructed the witness to provide false and misleading testimony to the grand jury. The witness however, was an undercover government agent who never intended to testify in front of the grand jury). Osborn v. United States, 385 U.S. 323, 333 (1966) (Defendant employed an individual to contact a prospective juror and offer him a bribe. The individual was an informant for the government. Although the informant never intended to carry out the scheme to bribe the juror, that did not preclude the defendant's conviction for endeavoring to bribe a juror).
7. Examples. The following cases show actions that constitute violations of §1503.
 - a. Destroying documents sought by a grand jury. United States v. Ruggiero, 934 F.2d 440 (2d Cir. 1991).
 - b. Attempting to persuade a witness to falsely recant his trial testimony while the defendant's case is on appeal. United States v. Moody, 977 F.2d 1425 (11th Cir. 1992).
 - c. Soliciting a third-party to approach the judge in the defendant's case in an effort to influence the sentence to be imposed at the defendant's upcoming sentencing. United States v. Glickman, 604 F.2d 625 (9th Cir. 1979).
 - d. Standing up during the testimony of a witness, shaking his fist, and saying "You better not!" constituted obstruction of the due administration of justice. United States v. Harris, 558 F.2d 366 (7th Cir. 1977).
 - e. Falsifying a report likely to be given to a grand jury. United States v. Mullins, 22 F.3d 1365 (6th Cir. 1994).
 - f. Endeavoring to suborn perjury. United States v. Kenny, 973 F.2d 339 (4th Cir. 1992).

- g. Giving false denials of knowledge and memory or false and evasive testimony. United States v. Langella, 776 F.2d 1078 (2d Cir. 1985).
- 8. Title 18 U.S.C. § 1505. This statute was enacted to ensure that administrative and civil proceedings were as free from corruption, fraud, and threats as criminal proceedings. Thus, it covers proceedings before any agency, whether administrative or civil in nature, as well as any actions that are designed to impede any investigations that are being conducted by any agency or by Congress. (Although there is no EPO regarding §1505 this is included for the instructors' information)
- 9. The Statute. Entitled "Obstruction of Proceedings Before Departments, Agencies, and Committees," the statute provides as follows:
 - a. *"Whoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so; or*
 - b. *Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress - Shall be fined under this title or imprisoned not more than five years, or if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both."*
- 10. The Elements of the Statute. In order to prove a violation of § 1505, the following three (3) elements must be shown. United States v. Price, 951 F.2d 1028 (9th Cir. 1991).
 - a. Pending Proceeding. First, there must be a "proceeding" pending before a department or agency of the United States.

- b. Knowledge. Second, the defendant must be aware of the pending proceeding(s).
 - c. Intent. Third, the defendant must have intentionally endeavored to corruptly influence, obstruct or impede the pending proceeding(s).
11. Examples. The following cases show actions that constitute violations of §1505.
- a. Destroying documents after an administrative subpoena had been served on a corporation in the course of a Department of Energy audit. United States v. Sutton, 732 F.2d 1483 (10th Cir. 1984).
 - b. Submitting false reports by written and oral representations in a Department of Labor investigation. United States v. Sullivan, 618 F.2d 1290 (8th Cir. 1980).
 - c. Making false statements to a Department of Defense auditor. United States v. Leo, 941 F.2d 181 (3d Cir. 1991).
12. Title 18 U.S.C. §1510. Prior to the enactment of §1510 it was not a crime to obstruct a criminal investigation or inquiry before the initiation of proceedings within the scope of §1503 or §1505. This statute was enacted to close the loophole on the protection of witnesses and informants created as a result of the "pending proceeding" requirement of §1503 and §1505, and provide for the prosecution of those who would interfere with the criminal investigative process. When initially enacted §1510 prohibited any actions taken to obstruct federal criminal investigations by bribery, intimidation, misrepresentation, force or threats of force, and for retaliation against informants. In 1982 upon enactment of 18 U.S.C. §1512, section 1510 was amended. As amended §1510 prohibits any actions taken to obstruct federal criminal investigations by bribery. (See United States v. King, 762 F.2d 232 (2d Cir. 1985)). Section 1510 is aimed at those who try to buy the silence of an actual or potential witness through bribery. The statute also creates additional criminal liability when an officer of a financial institution "tips off" a customer or any other person about either the existence or the contents of a grand jury subpoena for financial information. However, that portion of the statute is beyond the purview of this course.
13. The Statute. Entitled "Obstruction of Criminal Investigations," the statute provides, in pertinent part, as follows:

“(a). Whoever willfully endeavors by means of bribery to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator shall be fined under this title, or imprisoned not more than five years, or both.”

14. The Elements of the Statute. To prove a violation of §1510, the government must establish the following elements.
 - a. Willfulness. First, the government must show that the defendant intentionally tried to obstruct, delay, or prevent another person from communicating information to a criminal investigator.
 - b. Bribery. Second, the government must show that the attempt to silence the witness was by means of bribery (offering something of value to the witness).
 - c. Criminal Statute. Finally, the information that the defendant is trying to stop from reaching criminal investigators must relate to a violation of a criminal statute of the United States.
15. Knowledge Required. The government must show that the defendant had actual knowledge that the intended recipient of the information was a federal criminal investigator. United States v. Lippman, 492 F2d 314 (6th Cir. 1974). However, the defendant need not actually know that the information has been or is about to be supplied to a federal criminal investigator. It is required only that the defendant believed that information might be supplied to a federal criminal investigator.
16. Victim's Intent. The government is not required to show that the victim actually intended to give information to a federal criminal investigator or that the defendant knew the contents of the information. Further, it is not necessary to prove that the victim felt threatened (i.e., the victim could be a willing participant in the obstruction).
17. Investigation Not Required to be Ongoing. To successfully prosecute a defendant for violating §1510, there is no requirement that an investigation be underway or ongoing. Actions taken prior to the commencement of a formal investigation come within the statute if the prosecution proves that the defendant knew or reasonably believed that the person sought to be influenced had relevant information and was likely to share it with law enforcement officers.

D. EPO #20: IDENTIFY THE GROUPS OF PERSONS WHO ARE PROTECTED UNDER TITLE 18 U.S.C., §§1512 AND 1513

1. Title 18 U.S.C. §1512. Congress passed the Victim Witness Protection Act in 1982 which created §1512 and §1513. Section 1512 was enacted to protect various classes of individuals before they testify or communicate information to a law enforcement officer. It prohibits conduct that is intended to drastically impact and subvert the lawful presentation of evidence in federal proceedings or the communication of information to a federal law enforcement officer or federal judge. It is important to note that this statute covers both "violent" tampering, as well as more subtle forms of tampering, such as deliberately using false and misleading statements to cause a witness to either fail to appear or to destroy or alter evidence.

2. §1512. Tampering with a witness, victim, or an informant

"(a) (1) Whoever kills or attempts to kill another person, with intent to--

(A) prevent the attendance or testimony of any person in an official proceeding;

(B) prevent the production of a record, document, or other object, in an official proceeding; or

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(2) Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to--

(A) influence, delay, or prevent the testimony of any person in an official proceeding;

(B) cause or induce any person to--

..... (i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(ii) alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;

(iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

..... (iv) be absent from an official proceeding to which that person has been summoned by legal process; or

(C) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

... (3) The punishment for an offense under this subsection is--

(A) in the case of murder (as defined in section 1111), the death penalty or imprisonment for life, and in the case of any other killing, the punishment provided in section 1112;

..... (B) in the case of--

(i) an attempt to murder; or

(ii) the use or attempted use of physical force against any person;

..... imprisonment for not more than 20 years; and

(C) in the case of the threat of use of physical force against any person, imprisonment for not more than 10 years.

(b) Whoever knowingly uses intimidation, threatens or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to--

(1) influence, delay or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to--

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

..... (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

... (3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than ten years, or both.

(c) Whoever corruptly--

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be fined under this title or imprisoned not more than 20 years, or both.

(d) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from--

... (1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

... (4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in

*such prosecution or proceeding;
or attempts to do so, shall be fined under this title or imprisoned
not more than one year, or both.*

*(e) In a prosecution for an offense under this section, it is an
affirmative defense, as to which the defendant has the burden of
proof by a preponderance of the evidence, that the conduct
consisted solely of lawful conduct and that the defendant's sole
intention was to encourage, induce, or cause the other person to
testify truthfully.*

(f) For the purposes of this section--

*(1) an official proceeding need not be pending or about to be
instituted at the time of the offense; and*

*(2) the testimony, or the record, document, or other object need
not be admissible in evidence or free of a claim of privilege.*

*(g) In a prosecution for an offense under this section, no state of
mind need be proved with respect to the circumstance--*

*(1) that the official proceeding before a judge, court, magistrate,
grand jury, or government agency is before a judge or court of the
United States, a United States magistrate [United States magistrate
judge], a bankruptcy judge, a Federal grand jury, or a Federal
Government agency; or*

*(2) that the judge is a judge of the United States or that the law
enforcement officer is an officer or employee of the Federal
Government or a person authorized to act for or on behalf of the
Federal Government or serving the Federal Government as an
adviser or consultant.*

*(h) There is extraterritorial Federal jurisdiction over an offense
under this section.*

*(i) A prosecution under this section or section 1503 may be
brought in the district in which the official proceeding (whether or
not pending or about to be instituted) was intended to be affected or
in the district in which the conduct constituting the alleged offense
occurred.*

*(j) If the offense under this section occurs in connection with a trial
of a criminal case, the maximum term of imprisonment which may
be imposed for the offense shall be the higher of that otherwise
provided by law or the maximum term that could have been
imposed for any offense charged in such case.*

*(k) Whoever conspires to commit any offense under this section
shall be subject to the same penalties as those prescribed for the
offense the commission of which was the object of the conspiracy."*

3. Section 1512 encompasses four distinct offenses.

a. Killing or attempting to kill a victim, witness, or informant;

- b. Intimidating, threatening, or misleading a witness, victim, or informant; and
 - c. Harassing a witness, victim, or informant.
 - d. Destroying or concealing documents to impair their integrity or availability in a proceeding.
4. The Elements of the Statute... The following elements must be proven to convict a defendant of violating §1512.
- a. Killing or Attempting to Kill a Victim, Witness or Informant
That the defendant killed, attempted to kill, or used physical force against a witness, victim or informant, **with the intent to:**
 - 1) Prevent their attendance or testimony in an official proceeding, **or**
 - 2) Prevent the production of documents, or other objects in an official proceeding, **or**
 - 3) Prevent the communication of a federal criminal violation to a federal law enforcement officer or judge.
 - b. Intimidating, Threatening or Misleading a Witness, Victim or Informant
 - 1) That the defendant **knowingly** used intimidation, threats, or engaged in misleading conduct toward another person **with the intent to:**
 - 2) Prevent their attendance or testimony in an official proceeding, **or**
 - 3) Prevent the production of documents or other objects in an official proceeding, **or**
 - 4) Prevent the communication of a federal criminal violation to a federal law enforcement officer or judge.
 - c. Harassing a Witness, Victim or Informant
 - 1) That the defendant **intentionally** harassed a witness, victim or informant which resulted in:
 - 2) Hindering, delaying, preventing, or dissuading the person from:
 - 3) Attending or testifying in an official proceeding, **or**
 - 4) Reporting to a law enforcement officer or judge of the United States a violation of federal law.

- d. Destruction, Mutilation or Concealment of Documents or Objects
 - 1) That the defendant **corruptly** altered, destroyed, ... mutilated, or concealed a record, document or other.... object **with the intent to:**
 - 2) Impair the object's integrity or availability for use in an official proceeding
- 5. Who is Protected? The following persons are protected by the provisions of §1512.
 - a. Victims;
 - b. Witnesses; and
 - c. Informants
- 6. Timing of the Offense. This statute covers actions by a defendant that take place before an individual testifies or provides information to the government.
- 7. Extraterritorial Jurisdiction. There is extraterritorial federal jurisdiction over an offense under §1512. Thus, the acts which constitute a basis for the charge do not have to occur within the jurisdiction of the United States.
- 8. Title 18 U.S.C. §1513. This statute protects witnesses, victims, and informants after they have testified or reported information to a criminal investigator or law enforcement officer. Under §1513, two types of conduct are addressed. First, the statute addresses threats of retaliation; second, the statute addresses attempts at retaliation.
- 9. The Statute. Entitled "Retaliating Against a Witness, Victim, or an Informant," the statute provides as follows.

§1513. Retaliating against a witness, victim, or an informant
(a) (1) *Whoever kills or attempts to kill another person with intent to retaliate against any person for--*

(A) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or

(B) providing to a law enforcement officer any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings,
shall be punished as provided in paragraph (2).

(2) The punishment for an offense under this subsection is--

(A) in the case of a killing, the punishment provided in sections 1111 and 1112; and

(B) in the case of an attempt, imprisonment for not more than 20 years.

(b) Whoever knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for--

(1) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or

(2) any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings given by a person to a law enforcement officer; or attempts to do so, shall be fined under this title or imprisoned not more than ten years, or both.

(c) If the retaliation occurred because of attendance at or testimony in a criminal case, the maximum term of imprisonment which may be imposed for the offense under this section shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(d) There is extraterritorial Federal jurisdiction over an offense under this section.

(e) Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

[(f)](e) Whoever conspires to commit any offense under this

section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.'

10. Section 1513 encompasses three distinct offenses when retaliatory action is taken against a victim, witness or informant on account of their involvement in a federal investigation or proceeding.
 - a. Killing or attempting to kill a witness, victim or informant
 - b. Causing bodily injury to a witness, victim or informant, or damage to their property,
 - c. Taking any harmful action against a witness, victim or informant.
11. The Elements of the Statute. The following elements must be proven to convict a defendant of violating §1513.
 - a. Killing or Attempting to Kill a witness, victim or informant.
 - 1) That the defendant killed or attempted to kill a witness, victim or informant with the ***intent to retaliate*** against them for:
 - 2) Their attendance or testimony in an official federal proceeding, ***or***
 - 3) The production of a document or other object in a federal proceeding, ***or***
 - 4) The communication of a federal violation to a federal law enforcement officer.
 - 5) Causing bodily injury to a witness, victim or informant or damage to their property.
 - 6) That the defendant ***knowingly*** engaged in any conduct which
 - 7) Caused bodily injury to another person or their property, or threatened to do so with ***the intent to retaliate*** against them for:
 - 8) Their attendance or testimony in an official federal proceeding, ***or***
 - 9) The production of a document or other object in a federal proceeding, ***or***
 - 10) The communication of a federal violation to a federal law enforcement officer.

Taking any harmful action against a witness, victim or informant.

- 11) That the defendant knowingly, with the intent to retaliate
 - 12) Took any harmful action, including interference with the lawful employment or livelihood of any person,
 - 13) For providing to a law enforcement officer any truthful information relating to the commission or possible commission of any federal offense.
12. In order to prove a violation of any provision of §1513, the government must prove the following elements.
- a. An Act. First, the government must prove that the defendant retaliated against, attempted to retaliate against, or threatened to retaliate against, an individual who had testified or reported information to a criminal investigator.
 - b. Intent. Second, the government must prove that the defendant acted with the specific intent to retaliate against the individual for his or her testimony or reporting.
 - c. Knowledge. Third, the government must prove that the defendant intentionally took action against the individual with the knowledge that the victim or another person had been a party to or a witness in a federal proceeding or had reported information to a federal law enforcement officer.
 - d. Proof. To sustain a retaliation charge the defendant must engage in conduct that caused or threatened a witness with bodily injury, the defendant acted knowingly with specific intent to retaliate against the witness for information the witness divulged to law enforcement authorities about a federal offense, and the officials to which the witness divulged information were federal agents. United States v. Draper, 553 F.3d 174 (2nd Cir. 2009). A witnesses interaction with local authorities which just happen to be reported to federal authorities, does not provide the requisite federal contacts under the statute.
13. Extraterritorial Jurisdiction. Again, there is extraterritorial federal jurisdiction over an offense under section 1513.

E. EPO #21: IDENTIFY CONDUCT THAT CONSTITUTES “TAMPERING” IN VIOLATION OF TITLE 18 U.S.C. §1512 AND CONDUCT THAT CONSTITUTES “RETALIATION” IN VIOLATION OF TITLE 18 U.S.C. § 1513

1. The following acts constitute “tampering” in violation of 18 U.S.C. § 1512.
 - a. Killing or attempting to kill a person to prevent testimony or production of documents or information. United States v. Galvan, 949 F.2d 777 (5th Cir. 1991).
 - b. Using intimidation tactics, although the witness does not have to be intimidated in fact. United States v. Johnson, 903 F.2d 1084 (7th Cir. 1990).
 - c. Using physical force against a witness or informant. United States v. Scaife, 749 F.2d 338 (6th Cir. 1984).
 - d. Threatening the use of physical force. United States v. Dunning, 929 F.2d 579 (10th Cir. 1991).
 - e. Corruptly persuading a person not to testify. United States v. Aguilar, 21 F.3d 1475 (9th Cir. 1994).
2. The following demonstrates “retaliation” in violation of 18 U.S.C. § 1513.
 - a. Actions that do not rise to the level of attempt may be successfully prosecuted as “endeavors” under this statute, if the goal was to cause injury. United States v. Garcia-Pupo, 845 F.2d 8 (1st Cir. 1988).
 - b. Threats to retaliate are enough to prosecute under this statute when it can be proven that the defendant acted with the specific intent to obstruct a federal investigation or proceeding. United States v. Brown, 937 F.2d 32 (2d Cir. 1991).
 - c. The fact that a threat is never carried out does not act as a defense to a charge of violating §1513. United States v. Maggitt, 784 F.2d 590 (5th Cir. 1986).

F. §1503 OMNIBUS CLAUSE AND §1512

1. With the passage of the Victim and Witness Protection Act in 1982 it was possible for a person to be charged with witness tampering under §1512 or under §1503 (Omnibus Clause). An issue for the courts to decide was whether §1512 was the exclusive statute for charging witness tampering, or could a person be charged with witness tampering under the Omnibus Clause of §1503.
2. A majority of circuits have rejected the idea that §1512 is the exclusive statute for charging witness tampering, and have held that §1503 (Omnibus Clause) may be used if desired by the government. Keep in mind that the pending proceeding requirement must be met in prosecution under §1503 (Omnibus Clause).
3. Cases that have held that §1512 is not the exclusive statute for charging witness tampering:
 - a. United States v. Kenny, 973 F.2d 339 (4th Cir. 1992)
 - b. United States v. Branch, 850 F.2d 1080 (5th Cir. 1988)
 - c. United States v. Wesley, 748 F. 2d 962 (5th Cir. 1984)
 - d. United States v. Tackett, 113 F.3d 603 (6th Cir. 1997)
 - e. United States v. Maloney, 71 F.3d 645 (7th Cir. 1995)
 - f. United States v. Rovetuso, 768 F.2d 809 (7th Cir. 1985)
 - g. United States v. Risken, 788 F.2d 1361 (8th Cir. 1986)
 - h. United States v. Ladum, 141 F.3d 1328 (9th Cir. 1998)
 - i. United States v. Moody, 977 F.2d 1420 (11th Cir. 1992)
4. Cases that have held that §1512 is the exclusive statute for charging witness tampering:
 - a. United States v. Masterpol, 940 F.2d 760 (2d Cir. 1991)
 - b. United States v. Hernandez, 730 F.3d 895 (2d Cir. 1984)

VI. FEDERAL FRAUD STATUTES

INSTRUCTORS NOTE: This material is taught in Block of Federal Criminal Law Instruction #6 (FCL 6)

A. RAPPORT AND OPENING STATEMENT

1. Title 18 U.S.C. §1341, Mail Fraud, Title 18 U.S.C. §1343, Wire Fraud, and Title 18 U.S.C. §2314, Interstate Transport of Stolen Property (or the National Stolen Property Act) are three of the most important statutes utilized by Federal criminal investigators to combat the full gamut of frauds, schemes and swindles that know no state boundaries. In fact, crimes which would otherwise be purely state or local offenses can gain Federal stature by the simple act of using the United States mails, an interstate commercial carrier, the interstate communications system, or any other facility of interstate commerce.
2. Title 18 U.S.C. §1341 is based on Article I, section 8 of the United States Constitution, which vests authority in the Federal government over "post offices and post roads". By 1872, when the statute was enacted, the United States mails had become the easiest and least expensive means for communicating throughout the country and its territories. Unfortunately, the unscrupulous were quick to capitalize on this new convenience as a mechanism for committing frauds. The advantages of using the mails to commit schemes, frauds and swindles were many: fewer face-to-face transactions, making identification and prosecution more difficult; the availability of rented post office boxes, which allowed those so inclined to operate under a false name in a town where they did not reside; the limited resources of state and local law enforcement authorities, which made investigations of crimes originating in other states difficult to investigate; and the absence of laws that made conduct spanning more than one state illegal. Congress closed that door with the enactment of this statute in 1872.
3. More recently, with the advent of the telegraph, telephone, radio, television and the Internet, as well as improved means to travel in interstate and foreign commerce, creative criminals have devised means of defrauding victims by relying on these various interstate communications facilities and travel means. Schemes have ranged from the religious, such as that perpetrated by Jim and Tammy Faye Bakker, to the "boiler room" scams which target older people and obtain money via telephone using various bullying techniques. New schemes are arising on a daily basis on the Internet. In addition, con artists lure their victims over state lines and from overseas to mislead them face-to-face. As a result, these three statutes remain a vital part of the Federal investigator's arsenal against crime.

B. ENABLING PERFORMANCE OBJECTIVES (EPO)

1. EPO #22: Identify and apply the elements of the Mail Fraud statute, Title 18 U.S.C. §1341, and the Wire Fraud statute, Title 18 U.S.C. § 1343.
2. EPO #23: Identify and apply the elements of the National Stolen Property Act, Title 18 U.S.C. §2314.

C. EPO #22: IDENTIFY AND APPLY THE ELEMENTS OF THE MAIL FRAUD STATUTE, TITLE 18 U.S.C. §1341, AND THE WIRE FRAUD STATUTE, TITLE 18 U.S.C. §1343.

1. Title 18 U.S.C. §1341. Titled “Frauds and Swindles”, but commonly referred to as the “Mail Fraud Statute”, this statute provides as follows:

“Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.”

2. Elements of Title 18 U.S.C. §1341. Title 18 U.S.C. §1341 is designed to criminalize the use of the mails to facilitate a fraud, scheme or other illegal plan. In order for a person to be convicted under this statute, the government must prove beyond a reasonable doubt each of the following five elements:
 - a. Any person who
 - b. Intentionally

- c. Devises a fraudulent scheme, and
- d. Uses or causes the mails to be used (Postal Service or private/commercial interstate carrier)
- e. In furtherance or in support of the scheme.

American Automotive Accessories, Inc. v. Fishman, 175 F.3d 534, 542 (7th Cir. 1999); Virden v. Graphics One, 623 F.Supp. 1417, 1422-1423 (C.D. Cal. 1985). If these elements are proven and the defendant is found guilty, he/she can be fined up to \$250,000 per count or imprisoned up to 20 years, or both. If the victim or target of the scheme is a financial institution, the fine can be up to \$1,000,000 or imprisonment of up to 30 years, or both.

3. Proof of the Elements of Mail Fraud

- a. What is "intentionally"? An action is proved to have been taken with specific intent if it is proven that "the scheme was reasonably calculated to deceive persons of ordinary prudence and comprehension". Virden, supra, at 1422. How can intent be proven? Intent is proven by showing the scheme itself. The scheme may utilize an affirmative misrepresentation of fact, or may instead involve the deceitful concealment of material facts. Virden, supra. A prior warning to cease and desist fraudulent activity can serve as evidence of specific intent to defraud in a subsequent, similar scheme. United States v. Phipps, 595 F.3d 243 (5th Cir. 2010)

- b. What is a "fraudulent scheme"? A fraudulent scheme is the intentional presentation of falsehoods as if true, with the goal of causing someone to part with something of value under false pretenses. The words "to defraud" commonly refer to "wronging one in his property rights by dishonest methods or schemes, and usually signify deprivation of something of value by trick, deceit, chicane or overreaching." McNally v. United States, 483 U.S. 350 (1987). Schemes depriving people from controlling their assets by withholding information necessary to make discretionary economic decisions falls within the statute. United States v. Carlo, 507 F.3d 799 (2d Cir. 2007). Does the misrepresentation have to be material to the fraud? Under the holding of Neder v. United States, 527 U.S. 1 (1999), the answer is yes. The Supreme Court pointed out that the well-settled meaning of "fraud" required a misrepresentation or concealment of material fact, and therefore, the materiality of the falsehood is an element of the federal mail fraud statute. Neder, supra at 22 - 23. A matter is material if "(a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it." Restatement (Second) of Torts § 538 (1976). A misrepresentation "must have the purpose of inducing the victim of the fraud to part with the property or undertake some action that he would not otherwise do absent the misrepresentation or omission." United States v. Daniel, 329 F.3d 480, 487 (6th Cir. 2003); (it is material if it has a tendency to influence or is capable of influencing a decision). Neder, supra at 16; United States v. McAuliffe, 490 F.3d 526 (6th Cir. 2007), cert. denied 2007 U.S. LEXIS 11620 (2007). Whether or not a victim in fact relied upon a defendant's false representation is irrelevant in fraud cases. United States v. Ghilarducci, 480 F.3d 542 (7th Cir. 2007), cert. denied 2007 U.S. LEXIS 10281 (2007).

- c. In 1988, Congress expanded the definition of "scheme or artifice to defraud" when it enacted Title 18 U.S.C. §1346, which states: "*For the purpose of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services.*" Thus, no longer does the scheme have to involve the taking of money or tangible personal property, as previously defined in McNally, supra. **In a mail/wire fraud case regarding misuse of corporate positions by executives seeking private gain, the scheme to defraud must involve bribery or kickbacks that deprive the corporation or its shareholders of honest services. Skilling v. U.S., 2010 U.S. LEXIS 5259. See also Black v. U.S., 2010 U.S. LEXIS 5253.** This statute can also be used to reach schemes which deprive the public of the honest services of public officials. However, the Circuits are split on their willingness to apply the Mail Fraud statute to cases involving dishonest services.
- d. What act "causes the mails to be used"? It is not necessary to show that the defendant personally used the mail services, but only that the defendant caused the mail services to be used by "acting with the knowledge that their use would follow in the ordinary course of business, or where such use could reasonably be foreseen." American Automotive Accessories, Inc. v. Fishman, 175 F.3d 534, 542 (7th Cir. 1999), citing United States v. Alexander, 135 F.3d 470, 474-475 (7th Cir. 1998); see also, United States v. Wicker, 80 F.3d 263 (8th Cir. 1996); United States v. Fox, 69 F.3d 15 (5th Cir. 1995). Thus, evidence will be sufficient to meet this element of the offense when it can be proven either that:
- 1) the defendant personally used the mails for the purpose of executing a scheme to defraud; or
 - 2) the defendant acted knowing that the use of the mails would follow in the ordinary course of business; or
 - 3) even when the use of the mails was not intended, such use was reasonably foreseeable.

- a) Virden v. Graphics One, 623 F.Supp. 1417, 1422 (C.D. Cal. 1985), citing United States v. Garner, 663 F.2d 834, 838 (9th Cir. 1981), cert. denied, 456 U.S. 905 (1982); see also American Automotive Accessories, Inc., *supra*, at 542.
- b) Each mailing which is in furtherance of the scheme is a separate offense, and will support a separate charge. United States v. McClelland, 868 F.2d 704 (5th Cir. 1989). The mailing can be either interstate or intrastate (Article I, section 8, United States Constitution).
- e. What is "in furtherance or in support of the scheme"? The mailings do not have to be an essential part of the planned scheme, but they must be made for the purpose of executing the scheme. Virden v. Graphics One, 623 F.Supp. 1417, 1423 (C.D. Cal. 1985). The mailings do not have to occur at the time of the original fraud. If the defendant is engaged in an ongoing scheme, and the mailings are both reasonably foreseeable and allow the scheme to continue undetected, the defendant can be charged with mail fraud for each mailing that occurs, even if the mailings occur years after the original fraud. United States v. Lane, 474 U.S. 438, 451-2 (1986) (mailings are within the five-year statute of limitations if their purpose is "to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place"); Schmuck v. United States, 489 U.S. 705 (1989) (in odometer rollback scheme, later mailings of titles by state transportation department were reasonably foreseeable and facilitated the continuance of the scheme). Communications that occur after initial purchase into the fraudulent scheme, designed to lull the victim into a false sense of security, postpone inquiries or complaints, or make the transaction less suspect, are mailings in furtherance of the scheme. United States v. Phipps, 595 F.3d 243 (5th Cir. 2010). (faxing updated "contact" information in anticipation of future dealings with the victims was important in lulling the victims into believing the scheme was a legal, secure financial program)...

4. Title 18 U.S.C. § 1343. Officially titled “Fraud by Wire, Radio, or Television”, this statute is commonly referred to as the “Wire Fraud Statute”. It provides:
- a. *“Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.”*
 - b. Elements of Title 18 U.S.C. §1343. Cases consistently state that the elements of Title 18 U.S.C. §§ 1341 and 1343 are the same. American Automotive Accessories, Inc. v. Fishman, 175 F.3d 534, 542 (7th Cir. 1999); United States v. Ames Sintering Co., 927 F.2d 232, 234 (6th Cir. 1990); United States v. Puckett, 692 F.2d 663, 669 (10th Cir.), cert. denied, 459 U.S. 1091 (1982). One substantial difference, however, is that, to be indictable under Section 1343, the wire transmission must have been **interstate**. Puckett, supra. Intrastate telephone calls and transmissions do not violate the statute.

The communication required under the statute does not have to be directed to the victim of the fraudulent scheme, and the defendant does not have to be the person who made the wire communication if he participated in devising the scheme to defraud and the use of interstate wires was foreseeable. United States v. Puckett, 692 F.2d 663, 669 (10th Cir. 1982), cert. denied, 459 U.S. 1091 (1982). The scheme does not have to actually succeed, the victim does not have to actually suffer a loss, nor does the defendant have to secure a gain to be prosecuted under this statute, and the communication itself does not have to actually further the scheme. United States v. Ames Sintering Co., 927 F.2d 232, 235 (6th Cir. 1990). Interstate and international telephone calls seeking a person to execute a horse to complete an insurance scheme supported wire fraud convictions. United States v. Lindemann, 85 F.3d 1232 (7th Cir. 1996), cert. denied, 519 U.S. 966 (1996). Similarly, interstate telephone calls made by patients to schedule appointments with a medical doctor who fraudulently treated them for infertility were properly indicted as wire fraud charges. United States v. Jacobson, 1993 U.S. App. LEXIS 22534 (4th Cir. 1993), cert. denied, 511 U.S. 1069 (1994). Finally, as with the Mail Fraud statute, wire transmissions designed to lull a victim into complacency, thereby keeping him from discovering the fraud and contacting the authorities, can be charged even though they occur after the defendant has obtained something of value from the victim. In effect, these "lulling" wires extend the five-year statute of limitations in a wire fraud case. See, e.g., United States v. Rogers, 9 F.3d 1025 (2d Cir. 1993); United States v. Phipps, 595 F.3d 243 (5th Cir. 2010).

D. EPO #23: IDENTIFY AND APPLY THE ELEMENTS OF THE NATIONAL STOLEN PROPERTY ACT, TITLE 18 U.S.C. §2314

1. Title 18 U.S.C. §2314. The National Stolen Property Act, commonly referred to as the "Interstate Transport of Stolen Property" or "ITSP", was enacted to federalize thefts and frauds that crossed state lines. In 1990, the statute was amended to encompass the transportation of stolen goods through foreign commerce. The statute provides as follows:
 - a. *"Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5000 or more, knowing the same to have been stolen, converted or taken by fraud; or*

- b. *"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person or persons to travel in, or to be transported in interstate or foreign commerce in the execution or concealment of a scheme or artifice to defraud that person or those persons of money or property having a value of \$5000 or more; or*
- c. *"Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or*
- d. *"Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's checks bearing a forged countersignature; or*
- e. *"Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof —*
- f. *"Shall be fined under this title or imprisoned not more than ten years, or both.*
- g. *"This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government. . This section also shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of any bank note or bill issued by a bank or corporation of any foreign country which is intended by the laws or usage of such country to circulate as money.".....*

2. Title 18 U.S.C. §2314 – Generally. Congress enacted the National Stolen Property Act (hereinafter, “ITSP”) pursuant to its authority under the Commerce Clause. In general, its provisions prohibit: transporting goods known to be stolen, converted or fraudulently obtained across state lines or our national boundaries; inducing or causing people to travel, or transporting them, across state lines or our national boundaries in furtherance of a fraudulent scheme; and transporting forged securities and traveler's checks across state lines or our national boundaries. The statute converts what were once solely state and local crimes into federal violations, thereby supplementing and enhancing local law enforcement efforts by extending federal law enforcement jurisdiction.
3. Elements of Title 18 U.S.C. §2314. The statute is comprised of five distinct provisions which together proscribe activities involving the transportation of certain specified items and persons across state lines and in interstate commerce. Each such provision requires its own elements of proof and will be considered in order of appearance:
4. Paragraph One - The Elements:
 - a. Transportation in interstate or foreign commerce
 - b. Of any goods, wares, merchandise, securities or money valued at \$5000 or more. . . .
 - c. Knowing the same to have been stolen, converted or taken by fraud.
5. Paragraph One – Proving the Elements:
 - a. Interstate or Foreign Commerce. Generally, a prosecution for violation of ITSP will not lie unless the property or moneys obtained by theft or fraud have been transported or transferred across state lines or in foreign commerce. Transportation or transfer of such items within a single state does not satisfy the requirements of the statute. It is the transport or transfer of the stolen or fraudulently obtained property or moneys from one state to another or between the United States and a foreign country that violates the statute and confers federal jurisdiction over the crime. Thus, a thief who steals property in Georgia and then transports it to Florida commits a violation of ITSP. If instead he remains in Georgia with the proceeds of his theft, the suspect has violated state law, but not federal law.

- b. Transport, transfer or transmit. The means by which the stolen or fraudulently obtained property or money is transported, transferred or transmitted across state lines is not material. However, the funds/property transferred must be proceeds of the fraud or derived from the proceeds of the fraud. United States v. Poole, 557 F.2d 531 (5th Cir. 1977). The funds or property transferred must be directly traceable to the proceeds of the fraud or directly traceable to the property or funds derived from the proceeds of the fraud. Evidence of commingled proceeds in accounts is insufficient. United States v. Lazarenko, 546 F.3d 593 (9th Cir. 2008). It is sufficient that the defendant transported the item personally or *caused* the item to be transported, transferred or transmitted in interstate or foreign commerce. Pereira v. United States, 347 U.S. 1 (1954). Thus, reliance on a private or commercial courier, or use of the U.S. Mail, thereby causing the interstate transport of the stolen merchandise, satisfies this element of the statute. Furthermore, when an act is performed with knowledge the mail will be used in the ordinary course of business, or where such use can be reasonably foreseen, even though not actually intended, the person “causes” the mail to be used. Likewise, interstate wire transfers of funds obtained through theft or fraud constitute violations of ITSP. The courts have consistently held that ITSP can be charged concurrently with the Mail Fraud and Wire Fraud statutes because they demand proof of at least one different element. Accord Pereira at 9. With regard to foreign commerce, ITSP makes it a crime to transport to the United States goods stolen in a foreign country, even if they do not subsequently travel in interstate commerce once in country. United States v. Davis, 608 F.2d 555 (5th Cir. 1979). Further, property or moneys obtained by fraud or theft in the United States and then transported or transmitted overseas violate ITSP. The Second Circuit has held that stolen property transported to a restricted customs area by an exporter and placed in the possession of the shipping company was “in foreign commerce” though no borders had been crossed. United States v. Ajlouny, 629 F.2d 830 (2d Cir. 1980), cert. denied, 449 U.S. 1111 (1981).

- c. Value of \$5000 or more. To sustain a conviction under ITSP, the government must prove the stolen or fraudulently obtained property transported in interstate or foreign commerce is valued at \$5000 or more. According to the legislative history of the statute, the purpose of this limitation is to avoid over-extending the resources of the federal government by leaving prosecutions of less substantial thefts and frauds to the states. In addressing the valuation element of ITSP, the courts refer initially to 18 U.S.C. § 2311, which defines "value" as "face, par, or market value, whichever is the greatest". For items with no face or par value, the courts have generally defined market value as "the price a willing buyer would pay a willing seller either at the time and the place that the property was stolen or at any time during the receipt or concealment of the property." United States v. Robinson, 687 F.2d 359, 360 (11th Cir. 1982); accord, United States v. Ruhe, 191 F.3d 376 (4th Cir. 1999). In applying this standard, the courts look to the particular facts of each case and pose the question: in what type of transaction would the person from whom the property was stolen have engaged? If the victim was a wholesale merchant, the value for purposes of ITSP is the wholesale market price; if the victim was a retail merchant, the value of the stolen property is the retail market price. Robinson at 360; United States v. Willette, 764 F.Supp. 759 (N.D.N.Y. 1991). Where there is no established market for the stolen item, courts have relied on the prices paid among those dealing in the stolen property, referring to this as the "thieves market". See, United States v. Berkitt, 619 F.2d 649, 658 (7th Cir. 1980). Finally, each interstate or foreign transport or transfer of an item valued at \$5000 or more can be charged as a separate count of ITSP.

- d. Aggregation. The definition of "value" set forth in 18 U.S.C. 2311 concludes with the statement: ". . . and the aggregate value of all goods, wares, and merchandise, securities and money referred to in a single indictment shall constitute the value thereof." In Schaffer v. United States, 362 U.S. 511 (1960), the Supreme Court considered whether individual shipments of stolen goods in interstate commerce valued at less than \$5000 could be aggregated to attain the jurisdictional minimum specified by ITSP. Relying on a "sensible reading of the statute" the Court affirmed the notion that "where the shipments have enough relationship so that they may properly be charged as a single offense, their value may be aggregated." Schaffer at 517. In Schaffer, the aggregated value was based on series of shipments to a particular defendant. Where the shipments were spread among more than one person, the Fourth Circuit aggregated the value of the individual shipments once the government proved they were part of a "common design" (i.e., single plan or agreement). Andrews v. United States, 108 F.2d 511 (4th Cir. 1939).
- e. Knowledge. To obtain a conviction under ITSP, the government must show that the defendant knew that the items he transported or caused to be transported in interstate or foreign commerce were stolen, embezzled, or obtained by fraud. The government is not required to prove that the defendant knew, foresaw, or intended that the stolen items were or would be transported in interstate or foreign commerce. The courts have generally held that the jury may infer that a person in possession of recently stolen property knew the property was stolen, unless such possession is satisfactorily explained. Barnes v. United States, 412 U.S. 837, 845 (1973); see also, United States v. Cowden, 545 F.2d 257 (1st Cir. 1976), cert. denied, 430 U.S. 909 (1977); United States v. McGregor, 529 F.2d 928 (9th Cir. 1976).

6. Paragraph Two – The Elements: The second paragraph of ITSP makes it a federal crime to cause potential victims (or the agent of the victim) of a fraudulent scheme to travel in interstate or foreign commerce to execute or conceal the scheme. This provision of the statute is referred to as prohibiting “travel fraud”. In its most basic application, a con artist who misleads his victim in a face-to-face encounter can still be charged with ITSP if the victim or the victim’s agent crossed state lines or traveled into or out of the United States to investigate or learn of the fraudulent offer and ultimately handed his money or property to the defendant. See, e.g., United States v. Steffen, 251 F.3d 1273 (9th Cir. 2001). The elements of this second paragraph are:
 - a. Transportation of or inducement of a person to travel in interstate or foreign commerce . . .
 - b. For the purpose of defrauding that person of money or property valued at \$5000 or more.
7. Paragraph Two – Proving the Elements:
 - a. Transport or induce to travel in interstate or foreign commerce. This element of ITSP is met if a potential or actual victim of a fraud scheme travels in interstate or foreign commerce in connection with the scheme. It is not necessary to prove the victim actually parted with their money or property; instead it is sufficient if the defendant induced them to travel in an effort to defraud them. Likewise, the government need not prove that the money or property lost by the victim to the defendant traveled in interstate or foreign commerce. United States v. Benson, 548 F.2d 42, 46 (2d Cir. 1977). Thus, where a con artist induces his next door neighbor to travel out of state to view certain real estate parcels offered in a fraudulent scheme, he can be charged with ITSP whether or not the neighbor invests; further, he can be charged with ITSP based on the interstate travel of the neighbor even if the neighbor does not invest until he returns home and hands his funds to the con artist. (Of course, the U.S. Attorney’s decision whether or not to prosecute the case will generally rest on the amount of the *actual* loss suffered by the victims of the scheme).

- b. To Defraud of \$5000 or More. As with the Mail Fraud and Wire Fraud statutes, the government must prove the defendant's intent to defraud. See the prior discussion concerning that element under the Mail Fraud statute above. As to meeting the jurisdictional amount of \$5000 or more, see the discussion concerning the valuation element for Paragraph One above.
- c. Travel Fraud Cases. The following are examples of cases in which defendants have been charged with "travel fraud" under ITSP:
 - 1). United States v. Jacobson, 1993 U.S. App. LEXIS 22534 (4th Cir. 1993), cert. denied, 511 U.S. 1069 (1994) - § 2314 violated by doctor who induced out-of-state patients to travel to his Virginia clinic for fraudulent fertility treatments.
 - 2). United States v. Casperson, 773 F.2d 216 (8th Cir. 1985) – Travel fraud provision of ITSP violated through inducement of investors to travel across state lines in advance fee loan scheme.
 - 3). United States v. Biggs, 761 F.2d 184 (4th Cir. 1985) – Defendant committed travel fraud under ITSP by inducing Florida residents to visit coal mine in West Virginia for purposes of obtaining fraudulent investments.
- 8. Paragraph Three – The Elements: The third paragraph of ITSP prohibits the transportation of falsely made, forged, altered or counterfeited securities or tax stamps in interstate and foreign commerce. The government must prove the following elements:
 - a. Transport in interstate or foreign commerce . . .
 - b. Falsely made, forged, altered or counterfeited securities or tax stamps . . .
 - c. With unlawful or fraudulent intent . . .
 - d. Knowing the securities or tax stamps to be forged, altered or counterfeited.
- 9. Paragraph Three – Proving the Elements:

- a. Interstate or Foreign Commerce. See discussion above concerning this element under Paragraph One. In addition, as discussed below, this section of ITSP covers the negotiation of forged out-of-state checks. Thus, a defendant who makes payment with a falsely made or forged check drawn on an out-of-state bank can be charged with ITSP based on the subsequent interstate transfer of the check in the bank collection process. Pereira v. United States, 347 U.S. 1 (1954). Further, each act of transporting the subject securities in interstate or foreign commerce constitutes a single offense under ITSP. Thus, a defendant who transports several forged checks or securities at one time may be charged with only one count of ITSP. It is not the number of false securities, but rather the number of state lines crossed that determines the number of counts to be charged. United States v. Frierson, 2000 U.S. App. LEXIS 27939 (10th Cir.). Alternatively, the government may charge as separate counts of ITSP each negotiated check that enters interstate commerce to be processed through the banking system. See, e.g., United States v. Flick, 516 F.2d 489 (7th Cir. 1975), cert. denied, 423 U.S. 931 (1975); United States v. White, 524 F.2d 1249 (5th Cir. 1975), cert. denied, 426 U.S. 922 (1976).
- b. Falsely made, forged, altered or counterfeited securities. The following have been deemed "securities" for purposes of the third paragraph of ITSP:
- 1) Checks – see citations above; also, see below, this paragraph of ITSP does not apply to **checks with forged endorsements**;
 - 2) Quit Claim Deeds – United States v. Speidel, 562 F.2d 1129 (8th Cir. 1977), cert. denied, 435 U.S. 915 (1978);
 - 3) Money orders – United States v. Weisser, 737 F.2d 729 (8th Cir. 1984), cert. denied, 469 U.S. 1158 (1985);
 - 4) Motor vehicle titles with fraudulent odometer readings – Moskal v. United States, 498 U.S. 103 (1990);
 - 5) Stocks and bonds – United States v. Anderson, 532 F.2d 1218 (9th Cir. 1976), cert. denied, 429 U.S. 839 (1976); United States v. Taylor, 802 F.2d 1108 (9th Cir. 1986), cert. denied, 479 U.S. 1094 (1987).

- 6) The courts have held that airline tickets, credit cards, credit card slips, and leases are not “securities” under ITSP. In addition, the final paragraph of Section 2314 states that the statute’s provisions do not apply to counterfeit obligations and securities of the United States or any foreign government, nor falsely made or counterfeit foreign currency. (See Title 18 U.S.C. § 8 for the statutory definition of “obligation or other security of the United States”). The reason for this exclusion of United States obligations and securities from the provisions of ITSP lies in the fact that “trafficking in counterfeits, forgeries and spurious representations of [these instruments] is made criminal elsewhere in the United States Code by anti-counterfeiting statutes”, such as Title 18 U.S.C. §471. United States v. Robie, 166 F.3d 444, 454 (2d Cir. 1999). Finally, it should be noted that the language “falsely made, forged, altered or counterfeited securities” has been construed by the courts to not include **checks with forged endorsements**. See, e.g., United States v. Tyson, 690 F.2d 9 (1st Cir. 1982) (finding the forging of an endorsement on an otherwise valid security [here, a check] does not render the security falsely made, forged, altered, or counterfeited for purposes of paragraph three of ITSP). That language however, has been held to apply to checks signed by a maker using a fictitious name, United States v. Seay, 386 F.Supp. 550 (E.D. Ill. 1974) aff’d, 518 F.2d 646 (7th Cir. 1974) (per curiam), cert. denied, 423 U.S. 995 (1975); checks drawn on an account opened with a fictitious name, United States v. Metcalf, 388 F.2d 440 (4th Cir. 1968); checks bearing a forged signature of an authorized signatory to the account, United States v. Fletcher, 444 F.2d 619 (10th Cir. 1971); checks drawn on closed accounts, United States v. Phillips, 869 F.2d 1361 (10th Cir. 1988), cert. denied, 490 U.S. 1069 (1989); and checks bearing the actual signature of a person not authorized to act as a signatory on the account, United States v. Fontana, 948 F.2d 796 (1st Cir. 1991). At least one court noted that a check with a forged endorsement would fall under the provisions of the first paragraph of ITSP prohibiting the interstate transport of property stolen, converted or taken by

fraud, provided the \$5000 valuation requirement was met. Tyson at 16.

- c. Fraudulent Intent. The government must establish that the defendant transported the forged or counterfeit check or security with unlawful or fraudulent intent. The requisite intent may be established through the defendant's own statements and/or his participation in the scheme to transport or negotiate the securities. **See** United States v. Sheridan, 329 U.S. 379 (1946) (requisite intent under predecessor to Section 2314 was met by proof that defendant cashed check drawn on out-of-state bank which he knew to be forged and which entered interstate commerce for collection); United States v. Frierson, 2000 U.S. App. LEXIS 27939 (10th Cir. 2000) (statements to witness and on audiotape concerning defendant's knowledge and evidence of his participation in scheme established requisite intent).
 - d. Knowledge of Forgery or Counterfeit. To sustain a conviction under this paragraph of ITSP, the government must prove the defendant knew the security transported in interstate or foreign commerce was forged or counterfeited at the time of its transportation. **See** United States v. Resurreccion, 978 F.2d 759 (1st Cir. 1992) (defendant's knowledge that checks were counterfeit established in part by his statements to Customs agents indicating he hoped to obtain only 40% to 80% of the face value of certified checks drawn on a certain foreign bank). It is not necessary to prove in the case of a forged security that the defendant forged the endorsement himself; the government need only show that he knew the instruments he cashed had been forged. United States v. Solomon, 422 F.2d 1110 (7th Cir. 1970), cert. denied, 399 U.S. 911 (1970).
10. Paragraph Four – The Elements: In 1968, at the prodding of the travel industry, Congress amended ITSP to prohibit the transportation in interstate or foreign commerce of traveler's checks bearing forged countersignatures. The elements of this provision are:
- a. Transporting in interstate or foreign commerce . . .
 - b. Any traveler's check bearing a forged countersignature . . .
 - c. With unlawful or fraudulent intent.

11. Paragraph Four – Proving the Elements:
 - a. Interstate or Foreign Commerce. See above for prior discussions on this jurisdictional requirement.
 - b. Forged Traveler's Checks. Interstate transport of traveler's checks with forged countersignatures violates this provision of ITSP. Though the plain language of the statute suggests the traveler's check must be forged and then transported in interstate commerce, the courts have found this provision violated by defendants who stole the traveler's checks, transported them over state lines, and then forged them to negotiate them in the destination state. See United States v. Bates, 1999 U.S. App. LEXIS 221 (4th Cir. 1999); United States v. McGovern, 661 F.2d 27 (3d Cir. 1981), cert. denied, 454 U.S. 1157 (1982).
 - c. Unlawful or Fraudulent Intent. This element has not spawned much discussion by the courts as it pertains to the traveler's check provision of ITSP. It appears the defendant's unlawful or fraudulent intent is inferred from his possession and/or his negotiation of the forged documents.
12. Paragraph Five – The Elements: The final paragraph of ITSP prohibits the interstate transport of any tool, implement or other items used to counterfeit, alter or falsely make any security or tax stamps. While there are few reported decisions construing the elements of this proviso, the plain language of this section suggests that items used to affix authorized signatures, impress official seals or certifications, or imprint face amounts to checks and other securities would be covered if transported in interstate or foreign commerce. One court held that the paper on which a partially completed security was printed did not constitute a tool or implement within the meaning of this paragraph of ITSP.
13. Venue for Violations of Title 18 U.S.C. §§1341, 1343 and 2314. Venue for violations of the Mail Fraud statute, Wire Fraud statute and ITSP is governed by Title 18 U.S.C. §3237, which provides in pertinent part: "Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, . . . may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves."

As a consequence of the foregoing, mail fraud cases may be brought in the district where the subject mail matter is placed in the mail stream, any district through which it travels, or the district in which it is received by the addressee; wire fraud cases may be brought in the districts from which the transmission was sent, through which it passed, and in which it was received; and ITSP may be charged in the districts from which the stolen items or victims originated, through which they traveled, and in which they completed their journey. As a practical matter, however, the stated policy of the Department of Justice is to bring charges under these three statutes at their beginning and ending points, rather than in the districts through which the mail, transmission, victims or property merely passed.

14. Miscellaneous information concerning Mail and Wire Fraud Statutes

- a. Mail Fraud, Wire Fraud and ITSP are qualifying racketeering acts under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), Title 18 U.S.C. §1961, United States v. Dischner, 974 F.2d 1502 (9th Cir. 1992), cert. denied, 507 U.S. 923 (1993).
- b. Under the Interstate Travel in Aid of Racketeering Act ("ITAR"), Title 18 U.S.C. §1952, it is unlawful to travel, use the mails, or use any facility in interstate or foreign commerce to promote gambling, untaxed liquor, drugs, prostitution, arson, bribery, or crimes of violence.
- c. Most importantly, all three statutes are "specified unlawful activities" for purposes of the Money Laundering statutes, Title 18 U.S.C. §§1956 and 1957. Thus, any use of the illegal proceeds obtained through violations of the Mail Fraud, Wire Fraud and ITSP statutes which furthers continuing violations or conceal those crimes can be charged under various sections of the Money Laundering statutes. The penalties for violations of Sections 1956 and 1957 under the Federal Sentencing Guidelines are substantial; consequently, these charges serve as valuable bargaining chips in negotiating plea agreements with defendants.

VII. THEFT

INSTRUCTORS NOTE: check the **TEACHING NOTES** following the **Enabling Performance Objective** page at the beginning of this **Lesson Plan** to ensure you are aware of what is taught in **conjunction** with this block of material.

A. RAPPORT AND OPENING STATEMENT

1. Background:

a. This course is designed for uniformed officers... It covers one EPO identical to the CITP program, to wit: EPO #11, Identify the elements of Title 18 U.S.C. §1001... For the false statements section of this course, the instructor should refer to EPO #11.

b. Title 18 U.S.C. §641 makes it unlawful for anyone to commit a theft, embezzlement or conversion of property belonging to the United States. The statute reads:

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of \$1000, he shall be fined under this title or imprisoned not more than one year, or both.

c. The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

d. *Under Title 18 U.S.C. §3571, the maximum fine for the felony offense is \$250,000, and the maximum fine for the misdemeanor is \$100,000.*

B. ENABLING PERFORMANCE OBJECTIVES (EPO)

EPO #24: Identify and apply the elements of Title 18 U.S.C. §641...

C. EPO #24: IDENTIFY AND APPLY THE ELEMENTS OF TITLE 18 U.S.C. §641.

1. Title 18 U.S.C. §641 is a comprehensive statute designed to address four crimes which, at common law, were separate, but by this statute have been combined: Embezzlement, theft, conversion, and receiving stolen property. In each instance, for the offense to have federal jurisdiction, the item that is wrongfully appropriated must have in fact belonged to the United States. United States v. Tailan, 161 F.3d 591 (9th Cir. 1998). Items stolen from a post or Navy exchange are government property. United States v. Towns, 842 F.2d 740 (4th Cir.), cert. denied, 487 U.S. 1240 (1988); Tailan, supra. Postage stamps that are manufactured under a government contract come within the terms of the statute. United States v. Robie, 166 F.3d 444, 452-453 (2d Cir. 1999).
 - a. As an example, suppose a government employee is issued a government-owned vehicle that is to be used only for official business. One weekend, while his private vehicle is being repaired, the employee uses the government vehicle to take his wife shopping and out to dinner. What is the crime? Conversion. Is there any intent to permanently deprive the government of the property? The answer is no; however, it was a wrongful use of property belonging to the United States.
 - b. Assume that instead of taking the government vehicle for a night out with his spouse, the same employee sells the car to a friend who knows that it is the employee's government vehicle and that the employee lacks the authority to sell the car. What are the crimes? In this situation, there is theft by the employee, and receipt of stolen property by the friend. When a person responsible for processing and depositing income tax payment checks takes one, properly endorses the check, but then transfers the money from the proper government account to her personal account, the crime is embezzlement.
2. Theft of government property is the wrongful appropriation of government property by a person who has no lawful right to such property. The elements of theft of government property are:
 - a. Defendant knowingly;
 - b. Takes, carries away, or converts to the use of another;

- c. Something of value belonging to the United States, or made under a contract with the United States.
3. United States v. Forman, 180 F.3d 766 (6th Cir. 1999). It is not necessary that the defendant know the stolen item belongs to the United States; the prosecution need only prove that the defendant knew that he was taking something that did not belong to him, and that in fact, the item taken belongs to the United States. United States v. Crutchley, 502 F.2d 1195, 1201 (3d Cir. 1974). In order to prove that an item belongs to the United States, the government must prove that it had "title to, possession of, or control over" the item. United States v. Tailan, 161 F.3d 591, 592 (9th Cir. 1998), quoting United States v. Long, 706 F.2d 1044, 1049 (9th Cir. 1983).
 4. In the case of United States v. Robie, 166 F.3d 444 (2d Cir. 1999), the items stolen were misprinted postage stamps manufactured by a private printer under a government contract. The court found that, due to the contract terms and the supervision that was maintained over all aspects of the printing process by the U.S. Postal Service, including maintaining strict control over all waste product, the stolen misprinted stamps were indeed property of the United States or any property made or being made under contract for the United States or any department or agency thereof, and thus the theft was properly charged under this statute.
 5. When the crime alleged is a felony, one additional element must be proven: the value of the stolen item exceeds \$1,000. In Robie, supra, the primary issue was whether stolen misprinted stamps, which were never issued and scheduled for destruction, had a value reaching the felony level. There was substantial evidence that Robie had been able to dispose of the misprinted Richard Nixon stamps for over \$20,000; however, the court said that the stamps could not be valued by the price that was obtained in a "thieves market" because the value had to be set on the date of the theft, not on the date of the sale of the item. In the end, the court determined that the jury was permitted to infer that the stolen stamps had a value greater than their combined face value of \$51.20, and that the jury's finding on this element was supported by the evidence. Id. at 449-452.
 6. Where it is reasonable from the facts for a defendant to believe that the government has abandoned property, and the government cannot prove otherwise, a charge of theft of government property will not succeed. Morrisette v. United States, 342 U.S. 246 (1952).

7. Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted, or into whose hands it has lawfully come. The original taking of the property is lawful, or done with the express or implied consent of the owner, but once the property is lawfully acquired, the defendant fraudulently applies the money or property to another, illegal use. The elements of embezzlement are:
 - a. The money or property belongs to the United States or an agency thereof;
 - b. The money or property came into the possession or care of the defendant lawfully;
 - c. The defendant fraudulently appropriates the money or property to his/her own use or the use of others; and
 - d. The defendant does so knowingly and willfully with the intent to either temporarily or permanently deprive the United States of the use of the money or property so taken.
8. Note that with embezzlement, the original acquisition of the property or money is lawful; there is no fraud or scheme or crime committed in the original entrustment of the money or property. It is only after the entrustment occurs that the defendant begins the fraud. The defendant must be proven to know that the money or property does not belong to the defendant, and that knowing this fact, the defendant deliberately uses the item for his/her own purpose, either temporarily or permanently depriving the government of the use of the item. If the crime is alleged to be a felony, the government must also prove that the value of the property embezzled is over \$1,000.
9. Criminal conversion is the wrongful deprivation of goods or personal property belonging to another. It includes the unlawful assumption and exercise of the right of ownership over goods or personal property belonging to another, the alteration of their condition, or the exclusion of the owner's rights. The property can be converted either permanently or for an indefinite period of time. Conversion does not require an intent to keep the property, nor does it require a wrongful taking. Conversion may include misuse or abuse of property, as well as use in an unauthorized manner or to an unauthorized extent. The elements of conversion are:
 - a. Wrongful deprivation, use or abuse;
 - b. Of goods or personal property;
 - c. Belonging to the United States.

10. Conversion of government property requires some act inconsistent with the government ownership rights in the property. The conversion may include some abuse or misuse of property, or use of government property in some unauthorized manner. There is no requirement that the defendant intend to keep the property or deprive the government of the property. There is also no requirement that the taking of the property be wrongful. If the value of the property is over \$1,000, the crime is a felony.
11. What acts do not qualify as conversions of government property? In United States v. Wilson, 636 F.2d 225 (8th Cir. 1980), Wilson used a government secretary to type personal work for him relating to a business he was establishing. Many weeks, almost 100% of the secretary's time was spent doing Wilson's personal work. Wilson told the secretary that she was not to allow his personal work to interfere with government work. No attempt was made to conceal what was happening. This all took place during a period when there was almost no government work to be done, due to a reorganization. On these facts, the court held that the government had not shown that Wilson possessed the intent required for a conviction under Title 18 U.S.C. §641, because he had not interfered with the rights of the government to the secretary's work.
12. Receipt of stolen property can be charged when a person knowingly receives or buys stolen property with intent to keep for his or her own use or gain (i.e., to sell for profit). In addition, the statute allows a person to be charged with receipt of stolen property when that person knowingly receives property that the person knows is stolen. The person receiving the stolen property does not need to know that the stolen property belongs to the United States, but only that the property is stolen. If the value of the property is over \$1,000, the crime is a felony.

VIII. FALSE CLAIMS

INSTRUCTOR NOTE: This EPO supports LGD Lesson Plan #1153 (Advanced Legal Issues).
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A. RAPPORT AND OPENING STATEMENT

False claim offenses are found throughout the federal government. Every agency faces a daunting task of protecting the public tax dollars against false, fictitious and fraudulent claims. From run of the mill low dollar temporary duty false claims to high technology false claims involving contracting, etc. the public tax dollars are being assaulted on a daily basis. The good message in this arena however, recognizes that although false claims against the government are rampant, they are easy to prosecute once uncovered.

B. ENABLING PERFORMANCE OBJECTIVE

C. EPO #25 IDENTIFY AND APPLY THE ELEMENTS OF RESSENTING A FALSE, FICTITIOUS OR FRAUDULENT CLAIM

1. **Elements.** Title 18 U.S.C. § 287 provides:

- a. Whoever
 - 1) makes or presents
 - 2) to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof,
 - 3) any [(material) **not all circuits require the claim to be material**] claim upon or against the United States, or any department or agency thereof,
 - 4) knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.
- b. If the claim pertains to a DOD contract, the maximum fine increases to \$1,000,000. (See 18 U.S.C. §3623).
- c. Objective of the Statute. The Congressional objective in enacting 18 U.S.C. §287 was to broadly protect funds and property of the government from fraudulent claims, regardless of the particular form or function of government instrumentality upon which such claims were made. Rainwater v. United States, 356 U.S. 590 (1958). ***The plain purpose of the statute is to assure the integrity of claims and vouchers submitted to the government.*** United States v. Maher, 582 F. 2d 842 (4th Cir. 1978), cert. denied 439 U.S. 1115 (1979.)

2. **Department / Agency.** The federal criminal code (18 U.S.C. §6) defines the terms “department” and “agency” as follows:
 - a. The term “department” means one of the executive departments enumerated in section 1 of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government...
 - b. The term “agency” includes any department, independent establishment, commission, administration, authority, board, or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.
3. **Claim.** Claim means a demand for money or transfer of public property. United States v. Tieger, 234 F.2d 589 (3rd Cir. 1956), cert. denied 352 U.S. 941 (1956).
4. **Knowledge.** Knowledge./actus reus/mens reus under 18 U.S.C. §§2 and 287.
 - a. Defendants need not have knowledge of specific prohibitions of the statute (every criminal has constitutional right to be stupid). Johnson v. United States, 410 F.2d 38 (8th Cir. 1969), cert. denied 396 U.S. 822 (1969). Ignorance of the federal presence does not negate the requisite mens rea for a 18 U.S.C. §287 violation - intent to present a fraudulent claim. United States v. Montoya, 716 F.2d 1340, 1345 (10th Cir. 1983).

- b. The actus reus element of §287 requires the defendant present a claim to a "person or officer in the civil, military, or naval service of the United States," or a "department or agency" of the United States. The mens rea element of 18 U.S.C. §2 requires that the defendant, who presents a false claim to the government via an intermediary, **must know the intermediary is presenting the false claim to someone.** United States v. Gumbs, 283 F.3d 128 (3rd Cir. 2002) [Defendant was convicted for filing a false claim involving work performed for the Virgin Islands Government, which was paid for by a grant from the federal government; the claim was forwarded to the federal government for payment that was to be drawn on the "grant account"; the defendant was unaware that the claim was being forwarded for payment;(case reversed)]. **Therefore, in order to be convicted of willfully causing an intermediary to present a false claim to a federal department under 18 U.S.C. §2, a defendant must at least know that he is causing the intermediary to present a false claim to someone, even if he does not know that the department to which he is causing the intermediary to present a false claim is in fact a federal department.** United States v. Feola, 420 U.S. 671 (1975). **A defendant who simply presents a false claim, without any knowledge that the entity to whom the false claim is presented will in turn present the false claim to a third party(federal government), cannot be said to have willfully caused the intermediary to commit the actus reus prohibited under 18 U.S.C.S. § 2.**
5. **Knowingly.** Knowingly filing a false claim implicitly means "intent to defraud." United States v. Catton, 89 F.3d 387 (7th Cir. 1996). Submitting a claim that the defendant knows to be false, fictitious, or fraudulent is what the statute protects against. United States v. Maher, 582 F.2d 842 (4th Cir. 1978), cert. denied 439 U.S. 1115 (1979).
6. **Materiality (NOTE: Circuits are not in agreement).** 18 U.S.C. §287, unlike other false claims or false statement provisions such as 18 U.S.C. §1001 does not expressly state that "materiality" is an element of the offense.

- a. Before 1997, the Fourth and Eighth Circuits **held that materiality is an element** of 18 U.S.C. §287. United States v. Pruitt, 702 F.2d 152, 155 (8th Cir. 1983) and United States v. Snider, 502 F.2d 645, 652 n.112 (4th Cir. 1974); whereas the Second, Fifth, Ninth, and Tenth Circuits **held that materiality is not an element** under 18 U.S.C. §287. United States v. Upton, 91 F.3d 677 (5th Cir. 1996); United States v. Taylor, 66 F.3d 254, 255 (9th Cir. 1995); United States v. Parsons, 967 F.2d 452, 455 (10th Cir. 1992); United States v. Elkin, 731 F.2d 1005, 1009 (2nd Cir. 1984), cert. denied, 469 U.S. 822 (1984). [NOTE: criticized / questioned in Belzerian V. United States, 127 F.3d 237 (2nd Cir. 1997)]....
- b. The Eleventh Circuit explicitly avoided deciding whether materiality is an element under 18 U.S.C. §287. United States v. White, 27 F.3d 1531, 1535 (11th Cir. 1994).
- c. Because the statute expressly incorporates the term "fraudulent" in conjunction with the term "false", the Committee (on 11th Circuit Jury Instructions) believes that materiality is an essential element of the offense that must be submitted to the jury pursuant to the decisions of United States v. Gaudin, 515 U.S. 506 (1999); United States v. Wells, 519 U.S. 482 (1997); and Neder v. United States, 527 U.S. 1 (1999). The Court concluded in Wells that materiality was not an element of the offense of making a false statement in violation of 18 U.S.C. §1014, but held in Neder that use of the words "fraud" or "fraudulently" as terms of art in 18 U.S.C. §§ 1341, 1343, and 1344 **incorporated the common law requirement that proof of fraud necessitates proof of misrepresentation or concealment of a material fact.** Gaudin held that when materiality is an essential element of an offense, it must be submitted to the jury.
- d. Presently the 5th Circuit recommends "materiality" be included as an element of the offense. The pattern jury instructions for materiality in the 5th Circuit state: A claim is "material" if it has a natural tendency to influence, or is capable of influencing, the agency to which it was addressed. It is not necessary to show, however, that the government agency was in fact deceived or misled.

- e. The 6th Circuit holds proof of materiality is not necessary, because the terms false, fictitious and fraudulent are connected with the "disjunctive or" and thus must be given separate meaning. United States v. Saybolt, 577 F.3d 195 (3rd Cir. 2009).

7. **Statutory Construction.**

- a. As a matter of statutory construction, 18 U.S.C. §1341 does not supplant 18 U.S.C. §§ 287 and 1001 insofar as fraudulent claims against the United States are concerned. United States v. LaBar, 521 F. Supp. 203 (MD Pa, 1981), cert. denied 549 U.S. 945 (1982).
- b. 18 U.S.C. §§ 287, 1001 (Material False Statements), 1341 (Mail Fraud), and 1343 (Wire Fraud) **are not mutually exclusive** insofar as prosecution is concerned. United States v. Computer Sciences Corp. 689 F.2d 1181 (4th Cir. 1982), cert. denied 459 U.S. 1105 (1983) overruled in part on other grounds by Busby v. Crown Supply, 896 F.2d 833 (4th Cir. 1990) and overruled in part on other grounds as stated in Foster v. Wintergreen Real Estate Co., 2008 US Dist LEXIS 90466.

8. **False Statement made in conjunction with a False Claim.**

- a. 18 U.S.C. § 287 requires that a claim for money or property be presented to department or agency of the United States, upon or against the United States, whereas 18 U.S.C. §1001 requires only that a statement or representation, which need not involve money or property, be made within the jurisdiction of any department or agency of the United States. United States v. Johnson, 284 F. Supp. 273 (WD Mo, 1968), affd. 410 F. 2d 38 (8th Mo. Cir. 1968), cert. denied 396 U.S. 822 (1969.) **Thus, a defendant may be properly punished under 18 U.S.C. § 287 for making false claim against the United States and under 18 U.S.C. §1001 for making false statements** in a matter within the jurisdiction of the United States Probation Office, even though he committed only one act of lying (lied about ownership of his Porsche during an interview to determine whether or not he qualified for court-appointed counsel). Each statute requires proof of acts which the other does not. United States v. Allen, 13 F.3d 105 (4th Cir. 1993).

- b. False statement of fact made in connection with claim and as basis for the claim constitutes a false claim within the meaning of 18 U.S.C. §287. Evans v. United States, 11 F.2d 37 (4th Cir. 1926). The statements must be false under any reasonable interpretation. United States v. Adler, 623 F.2d 1287 (8th Cir. 1980)
- 9. **Intent.** Fraudulent intent and knowledge are required as part of the offense. Imperial Meat Co. v. United States, 316 F.2d 435 (10th Cir. 1963). ***Intent to defraud the government is not an element of the offense.*** United States v. Milton, 602 F.2d 231 (9th Cir. 1979). Simply acting with knowledge that the claim was false, or fictitious, or fraudulent (i.e. with consciousness that it was wrong) is all that is required to assure the statutes purpose of protecting the integrity of the claims and vouchers submitted to the government. United States v. Maher, 582 F.2d 842 (4th Cir. 1978), cert. denied 439 U.S. 1115 (1979).
- 10. **Interaction with Title 42 Offenses.**
 - a. Physicians can be prosecuted under 18 USC §§ 287 and 1001 for making false statements on claims submitted under medicaid and medicare programs, *rather than under specific provisions of 42 USC § 1395 (which covers medicare fraud)*. United States v. Adler, 623 F.2d 1287 (8th Cir. 1980.)
 - b. By enacting 42 USC §408, Congress did not intend to pre-empt, supersede, or impliedly repeal 18 USC 287. United States v. Ruster, 712 F.2d 409 (9th Cir. 1983)....
- 11. **Particular Claims.**
 - a. A tax preparer's act of submitting a tax return bearing a forged signature of a taxpayer, so the tax preparer could obtain the refund, constituted making a false claim. Kercher v. United States, 409 F.2d 814 (8th Cir. 1969).
 - b. Valid claims for work performed pursuant to illegally obtained government contracts is an offense under the statute. United States v. Winchester, 407 F. Supp. 261 (DC Del, 1975).
 - c. Application for credit insurance under the Fair Housing Authority program is not a claim within the meaning of the statute. The application does not make a demand for money or for some transfer of public property. United States v. McNinch, 356 U.S. 595 (1958).

- d. One who presents vouchers for payment for ammunition that he had caused to be packed and accepted by the government knowing that the ammunition had not been inspected and accepted by the government inspectors as complying with the contract specifications is a false claim. *United States v. United States Cartridge Co.*, 95 F. Supp 384 (DC Mo, 1950), *affd.* 198 F.2d 456 (8th Cir. 1952), *cert. denied* 345 U.S. 910 (1953).
 - e. Fraudulent representations made to post-office officials in order to receive second-class mailing permit, which allowed mailing of magazines at a lower rate than what would otherwise be proper, is a false claim. *United States ex rel. Rodriquez v. Weekly Publications, Inc.*, 68 F. Supp 767 (DC NY, 1946).
 - f. Submitting false claims for tax refunds in attempt to avoid paying income taxes is a violation of the statute. *United States v. Drape*, 668 F.2d 22 (1st Cir. 1982).
 - g. Internal revenue agent who presented fraudulent expense statements for approval by his superior, knowing that the superior's endorsement on the account presented to him was necessary before account would be paid, had presented a claim against the United States within the meaning of the statute. *Kurzrok v. United States*, 1 F.2d 209 (8th Cir. 1936).
12. **Defenses**. Good faith is a valid defense to "knowingly filing false", fictitious, or fraudulent claims." *United States v. Nash*, 175 F. 3d 429 (6th Cir. 1999).

IX. SUMMARY

A. REVIEW OF PERFORMANCE OBJECTIVES

Each session taught can include multiple EPOs from different criminal law blocks of material. **The Instructor must remember to cover all of the material contained within that individual block of instruction during the time assigned for that course.** What material is taught in the BASIC COURSE INSTRUCTION IS FOUND IN THE EPO SHEET THAT IS HANDED OUT BY LGD TO EACH BASIC COURSE CLASS.

B. REVIEW OF TEACHING POINTS

The Instructor should refer to each EPO and session for the teaching points to be reviewed at the end of that session. It is helpful to review in class previous blocks of instruction that can have an impact on the material you are teaching pursuant to this lesson plan...

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TEST ITEM CONTROL SHEET (TICS)

COURSE NUMBER: 1091 COURSE
 TITLE: Federal criminal law

Instructions: If a course is taught in sessions, put the EXAM number (E01, E02, E03, etc...) that the EPO will be tested on in the EDT. If all EPO's are tested on one exam, place an X in each box instead of the exam number. Using the test item numbers EAD has provided, complete the table below. Every EPO tested by multiple choice exam must be represented in each set with **one** test item. If an EPO is tested by PE or not tested at all put PE or NA in that corresponding EPO row in the program box. A TICS and EDT is required for all courses tested at all FLETC locations. Use more than one form if necessary.

Exam Distribution Table (EDT)

EPO	Set A	Set B	Set C	Set D	Set E	CITP	ICE_D	LMPT	UPTP
1.	I02891	I02899	I05254	I05154	I03086	E01	E02	E05	E05
2.	I02895	I02897	I06477	I06478	I06479	E01	E02	E05	E05
3.	I00742	I06480	I06481	I06482	I06483	E01	E02	E05	E05
4.	I02999	I06484	I06485	I06486	I06487	E01	E02	E05	E05
5.	I03000	I01235	I01237	I01233	I06488	E01	E02	E05	E05
6.	I01330	I01335	I01336	I06227	I06489	E01	E02	E05	E05
7.	I01331	I01337	I02270	I06228	I06490	E01	E02	E05	E05
8.	I03443	I03444	I03432	I05715	I05716	E01	E02	E05	E05
9.	I02204	I02208	I05261	I05262	I06491	E03	E02	NA	NA
10.	I02203	I02205	I02206	I02207	I05260	E03	E02	NA	NA
11.	I02193	I02192	I02191	I06492	I06493	E03	E02	E05	E05
12.	I07049	I01780	I01765	I05243	I06494	E03	NA	NA	NA
13.	I07575	I01779	I01776	I01775	I01761	E03	NA	NA	NA

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14.	I01755	I01771	I07050	I05543	I01772	E03	NA	NA	NA
15.	I01756	I01764	I05245	I05244	I01763	E03	NA	NA	NA
16.	I01754	I05247	I01760	I05246	I06495	NA	NA	NA	NA
17.	I07048	I01757	I01777	I06496	I06497	E03	NA	NA	NA
18.	I01788	I01791	I05454	I01795	I01790	E03	NA	E05	E05
19.	I02941	I02946	I05319	I06498	I06499	E03	NA	NA	NA
20.	I02949	I05320	I05408	I05409	I05410	E03	NA	NA	NA
21.	I05411	I05412	I05413	I05321	I02947	E03	NA	NA	NA
22.	I02195	I02196	I01784	I06500	I06501	E05	NA	NA	NA
23.	I06502	I06503	I06504	I06505	I06506	E05	NA	NA	NA
24.	I02137	I02138	I02139	I06507	I06508	E03	NA	E05	E05
25.	TBD	TBD	TBD	TBD	TBD				

NOTE: EPO #25 is part of an IAITP pilot program that is not presently tested. If there is a decision to test the material, the test questions are already written and will simply have to be assigned TICs numbers and inputted into the lesson plan TICs chart.

Implementation Instructions for EAD (if necessary):

Program Name	Date for item implementation	Use in all classes after class #	Special Instructions

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U.S. DEPARTMENT OF HOMELAND SECURITY
FEDERAL LAW ENFORCEMENT TRAINING CENTER
OFFICE OF TRAINING OPERATIONS
LEGAL DIVISION



Homeland Security

LESSON PLAN

FOURTH AMENDMENT

1211

FEB/10

WARNING

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Revised by:

(b)(6),(b)(7)(C)

Senior Instructors, LGD

SEP 2008

Revised by (b)(6),(b)(7)(C)

FEB 2010

Revised by (b)(6),(b)(7)(C) Senior Instructor, LGD

2010 revisions highlighted in yellow.

Summary of 2010 Revisions: Changes are preceded by ***. Use Word's Find command for *** to locate changes quickly.

1. Split EPO Table in two to make room for additional programs.
2. Added programs: ICE-DOTTP, ICE-FOTP and IPOTP.
3. Added MEPO 27 on gate inspections – taught only in IPOTP.
4. Added brief discussion about removing thick outer garments to permit adequate frisk of suspect of weapons.
5. Updated language about necessity of lawful stop to support frisk. Arizona v. Johnson.
6. Added discussion of existence of lawful stop in the special circumstance of a vehicle stop. Arizona v. Johnson. Brendlin v. California.
7. Added Instructor Note on extension of good-faith exception to exclusionary rule to allow admission of evidence despite police error so long as error is negligent and isolated. United States v. Herring.
8. Changed maximum time permitted to execute search warrant to 14 days, reflecting December 2009 amendment to FRCrP 41.
9. Added Michigan v. Fisher (S.Ct. 2009)(emergency aid entry) to examples of exigent circumstances.
10. Arizona v. Gant. Changed discussion of searching a vehicle incident to the arrest of one of its occupants. Updated new, additional requirements to justify search. Did not change “scope limited to passenger compartment.”
11. Added discussion and references for IPOTP EPO on gate inspections.
12. Added Risk Assessment.

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SYLLABUS

COURSE TITLE: FOURTH AMENDMENT
COURSE NUMBER: 1211.
COURSE DATE: FEB/10
LENGTH OF PRESENTATION: VARIES. SEE BELOW

OPTION	LECTURE	LAB	P.E.	TOTAL	PROGRAM
A	24:00	6:00	2:00	32:00	CITP
B	24:00	2:00 ¹		26:00	LMPT
C	22:00	4:00 ²	2:00 ³	28:00	UPTP
D	20:00			20:00	ICE-D
E	22:00	6:00		28:00	A_FAMTP
F	2:00			2:00	DOJOIG-IS
G	8:00			8:00	ICITP
H	7:00			7:00	USDA_PSYTP
I	4:00			4:00	A_VCITP
J	20:00	6:00 ⁵		26:00	IPOTP
K	2:00			2:00	ICE-DOTTP [NOT TESTED]
L	10:00			10:00	FWS_LESB [Pilot – Aug 2010]
M	3:00	1:00		4:00	TIGTA_AITP [NOT TESTED]
N	1:00			1:00	USFS-DETP [NOT TESTED]
O	7:00			7:00	CLETP
P	4:00			4:00	DCIS-SARTP
Q	22:00			22:00	A_BIA_BPOBTP
R	10:00			10:00	NCIS_CTP

¹ 4th Amendment Computer Based Skills Assessment Lab, evaluated by written, multiple-choice examination.

² 4th Amendment Skills Lab.

³ 4th Amendment Computer Based Skills Assessment Lab.

⁴IG-SWETP is not tested. The 4th hour of the class (the lab) is to review a student-generated search warrant application.

⁵IPOTP Labs consist of one 4-hour 4th Amendment Skills Lab and one 2-hour Computer Lab. These are modeled on those used in UPTP and borrow many common features and scenarios.

OPTION A
DESCRIPTION: This course examines the principles of search and seizure as prescribed by the Fourth Amendment. The exclusionary rule, probable cause, particularity, and other constitutional safeguards are identified and explained. Emphasis is placed on the proper preparation and execution of search warrants, as well as legal exceptions to the warrant requirements.
TERMINAL PERFORMANCE OBJECTIVE (TPO): Given a potential investigation, the student will identify the requirements for conducting a legal search both with and without a search warrant and submit a legally sufficient criminal complaint in accordance with Federal law and Constitutional standards.
OPTIONS B, C AND G
DESCRIPTION: This course examines the principles of search and seizure as prescribed by the Fourth Amendment. The exclusionary rule, probable cause, particularity, and other constitutional safeguards are identified and explained. Emphasis is placed on the proper preparation and execution of search warrants, as well as legal exceptions to the warrant requirements.
TERMINAL PERFORMANCE OBJECTIVE (TPO): Given a potential investigation, the student will identify the requirements for conducting a legal search both with and without a search warrant and submit a legally sufficient criminal complaint in accordance with Federal law and Constitutional standards.
OPTIONS D AND K
DESCRIPTION: This course examines the principles of search and seizure as prescribed by the Fourth Amendment. The exclusionary rule, probable cause, particularity, and other constitutional safeguards are identified and explained.
TERMINAL PERFORMANCE OBJECTIVE (TPO): Given a potential investigation, the student will identify the requirements for conducting a legal search both with and without a search warrant and submit a legally sufficient criminal complaint in accordance with Federal law and Constitutional standards.
OPTIONS E AND F
DESCRIPTION: This course examines the principles of search and seizure as prescribed by the Fourth Amendment. The exclusionary rule, probable cause, and other constitutional safeguards are identified and explained.
TERMINAL PERFORMANCE OBJECTIVE (TPO): Given a potential investigation, the student will identify the requirements for conducting a legal search both with and without a search warrant in accordance with Federal law and Constitutional standards.

OPTIONS H AND I
DESCRIPTION: This course examines the principles of search and seizure as prescribed by the Fourth Amendment.
TERMINAL PERFORMANCE OBJECTIVE (TPO): Given a potential investigation, the student will identify the constitutional requirements for conducting a legal search in accordance with Federal law and Constitutional standards.
OPTION J
DESCRIPTION: This course examines the principles of search and seizure as prescribed by the Fourth Amendment. The exclusionary rule, probable cause, warrantless searches, and other constitutional safeguards are identified and explained. Emphasis is placed on gate inspections.
TERMINAL PERFORMANCE OBJECTIVE (TPO): Given a potential investigation, the student will identify the requirements for conducting a legal search and submit a legally sufficient criminal complaint in accordance with Federal law and Constitutional standards.
OPTION L [Pilot in August 2010]
DESCRIPTION: This course exposes non-law enforcement supervisors to basic Fourth Amendment concepts affecting law enforcement operations in the land management context.
TERMINAL PERFORMANCE OBJECTIVE (TPO): Given a potential investigation, the student will identify the basic Fourth Amendment concepts applicable to law enforcement operations in the land management context in accordance with Federal law and Constitutional standards.
OPTION M
DESCRIPTION: This course reviews the basic principles of search and seizure for experienced agents.
TERMINAL PERFORMANCE OBJECTIVE (TPO): Given a potential investigation, the student will identify the constitutional requirements applicable to search and seizure in accordance with Federal law and Constitutional standards.
OPTION N
DESCRIPTION: This course reviews the basic principles for obtaining and executing for experienced agents.
TERMINAL PERFORMANCE OBJECTIVE (TPO): Given a potential investigation, the student will identify the constitutional requirements applicable to obtaining and executing search warrants in accordance with Federal law and Constitutional standards.

OPTIONS O AND P

DESCRIPTION: This course updates experienced agents on recent developments in Fourth Amendment law. EPOs are determined for each class with a student-centered approach and are driven by student need and recent case-law, statutory and policy developments.

TERMINAL PERFORMANCE OBJECTIVE (TPO): Given a potential investigation, the student will identify recent Fourth Amendment developments pertinent to law enforcement operations in accordance with Federal law and Constitutional standards.

OPTION Q

DESCRIPTION: This course examines the principles of search and seizure as prescribed by the Fourth Amendment. Emphasis is given to arrests and exceptions to the warrant requirement for searches.

TERMINAL PERFORMANCE OBJECTIVE (TPO): Given a potential investigation, the students will identify the statutory and constitutional requirements for conducting legal searches and seizures in the context of their technical duties in accordance with Federal law and Constitutional standards.

OPTION R

DESCRIPTION: This course examines the principles of search and seizure as prescribed by the Fourth Amendment. Emphasis is given to the constitutional principles pertinent to searches and seizures conducted for data and electronic transmissions in order to better understand follow-on instruction in Electronic Law and Evidence [1380].

TERMINAL PERFORMANCE OBJECTIVE (TPO): Given a potential investigation, the students will identify the statutory and constitutional requirements for conducting legal searches and seizures in the context of their technical duties in accordance with Federal law and Constitutional standards.

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ENABLING PERFORMANCE OBJECTIVES (EPO): OPTIONS A THRU H

A	B	C	D	E	F	G	H	Master EPO List
1	X	X	1	X	X	X	X	1. Recognize when the Fourth Amendment applies to governmental action. MEPO 1211-1
1	X	X	1	X	X	X	X	2. Identify situations in which a reasonable expectation of privacy exists. MEPO 1211-2
1	X	X	1	X		X	X	3. Identify appropriate actions that may be taken when reasonable suspicion exists. MEPO 1211-3
1	X	X	1	X	X			4. Identify when law enforcement officers may or may not use race to justify stops or arrests in accordance with Department of Justice Guidelines. MEPO 1211-4
1	X	X	1	X	X	X		5. Identify when probable cause exists to the extent that an arrest or search may be justified. MEPO 1211-5
3	X	X	1	X	X			6. Identify the origin, purpose and scope of the exclusionary rule. MEPO 1211-6
3	X	X	1	X	X			7. Identify exceptions to the exclusionary rule, e.g., no standing to object, good faith, inevitable discovery, and impeachment. MEPO 1211-7
3	X	X	3	X				8. Identify the limitations of an arrest warrant. MEPO 1211-8
3	X	X	3	X				9. Identify when an arrest involving a felony requires the use of a warrant. MEPO 1211-9
3	X	X	3	X				10. Identify when an arrest involving a misdemeanor requires the use of a warrant. MEPO 1211-10
3	X	X	3					11. Identify the conditions under which an officer an officer may use force to execute a warrant (search or arrest) according to the provisions of Title 18 U.S.C. § 3109. MEPO 1211-11.
3	X		3					12. Identify those officials who have the authority to issue Federal search warrants. MEPO 1211-12
3	X		3					13. Identify the components of an affidavit for a search warrant. MEPO 1211-13
3								14. Identify circumstances when a telephonic search warrant should be obtained. MEPO 1211-14
3	X		3					15. Identify the legal requirements for executing a search warrant, e.g., authority to execute; time of entry; method of entry; locations on a premises which may be searched; duration of the search; and inventory. MEPO 1211-15
3	X	X	3					16. Identify the scope and purpose of a protective sweep. MEPO 1211-16
3	X		3				X	17. Identify circumstances in which persons on the premises may or may not be searched for evidence or frisked during the execution of a premises warrant. MEPO 1211-17

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A	B	C	D	E	F	G	H	Master EPO List
3	X	X	3	X				18. Identify the circumstances in which evidence may be seized under the plain view doctrine. MEPO 1211-18
3	X	X	3	X				19. Identify fact situations where warrantless searches are allowed regarding motor vehicles. MEPO 1211-19
3	X	X	3	X				20. Identify fact situations where warrantless searches are allowed during exigent circumstances, e.g., hot pursuit, destruction or removal of evidence, and emergency scenes. MEPO 1211-20
3	X	X	3	X				21. Identify the requirements and scope of a search incident to a lawful arrest. MEPO 1211-21
3	X	X	3	X		X		22. Identify circumstances where a suspect's consent to search is voluntary. MEPO 1211-22
3	X	X	3	X		X		23. Identify the circumstances in which a third party has the actual or apparent authority to grant consent to search a suspect's property. MEPO 1211-23
3	X	X	3	X		X		24. Identify the requirements allowing an inventory of lawfully impounded personal property. MEPO 1211-24
3	X	X	3	X		X		25. Identify the circumstances when an inspection is permitted for real and personal property. MEPO 1211-25
								26. Identify circumstances when a warrant is required to seize vehicles subject to the general forfeiture statute. MEPO 1211-26
								27. Identify the legal standard for searching people and packages entering and leaving federal buildings and installations. [MEPO 1211-27]

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ENABLING PERFORMANCE OBJECTIVES (EPO): OPTIONS I THRU R

I	J	K	L	M	N	O	P	Q	R	Master EPO List
	X	X	X					X	X	1. Recognize when the Fourth Amendment applies to governmental action. MEPO 1211-1
	X	X	X					X	X	2. Identify situations in which a reasonable expectation of privacy exists. MEPO 1211-2
	X		X					X		3. Identify appropriate actions that may be taken when reasonable suspicion exists. MEPO 1211-3
X	X	X	X					X	X	4. Identify when law enforcement officers may or may not use race to justify stops or arrests in accordance with Department of Justice Guidelines. MEPO 1211-4
	X	X	X					X	X	5. Identify when probable cause exists to the extent that an arrest or search may be justified. MEPO 1211-5
	X	X	X					X	X	6. Identify the origin, purpose and scope of the exclusionary rule. MEPO 1211-6
	X		X					X	X	7. Identify exceptions to the exclusionary rule, e.g., no standing to object, good faith, inevitable discovery, and impeachment. MEPO 1211-7
	X							X		8. Identify the limitations of an arrest warrant. MEPO 1211-8
	X							X		9. Identify when an arrest involving a felony requires the use of a warrant. MEPO 1211-9
	X							X		10. Identify when an arrest involving a misdemeanor requires the use of a warrant. MEPO 1211-10
				X	X				X	11. Identify the conditions under which an officer an officer may use force to execute a warrant (search or arrest) according to the provisions of Title 18 U.S.C. § 3109. MEPO 1211-11.
				X	X				X	12. Identify those officials who have the authority to issue Federal search warrants. MEPO 1211-12
				X					X	13. Identify the components of an affidavit for a search warrant. MEPO 1211-13

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I	J	K	L	M	N	O	P	Q	R	Master EPO List
				X						14. Identify circumstances when a telephonic search warrant should be obtained. MEPO 1211-14
				X	X				X	15. Identify the legal requirements for executing a search warrant, e.g., authority to execute; time of entry; method of entry; locations on a premises which may be searched; duration of the search; and inventory. MEPO 1211-15
				X	X					16. Identify the scope and purpose of a protective sweep. MEPO 1211-16
				X	X					17. Identify circumstances in which persons on the premises may or may not be searched for evidence or frisked during the execution of a premises warrant. MEPO 1211-17
	X		X	X				X	X	18. Identify the circumstances in which evidence may be seized under the plain view doctrine. MEPO 1211-18
X	X		X					X		19. Identify fact situations where warrantless searches are allowed regarding motor vehicles. MEPO 1211-19
	X	X	X					X		20. Identify fact situations where warrantless searches are allowed during exigent circumstances, e.g., hot pursuit, destruction or removal of evidence, and emergency scenes. MEPO 1211-20
	X	X	X					X		21. Identify the requirements and scope of a search incident to a lawful arrest. MEPO 1211-21
X	X	X	X					X		22. Identify circumstances where a suspect's consent to search is voluntary. MEPO 1211-22
	X	X	X					X		23. Identify the circumstances in which a third party has the actual or apparent authority to grant consent to search a suspect's property. MEPO 1211-23
X	X		X					X		24. Identify the requirements allowing an inventory of lawfully impounded personal property. MEPO 1211-24
	X							X		25. Identify the circumstances when an inspection is permitted for real and personal property. MEPO 1211-25
										26. Identify circumstances when a warrant is required to seize vehicles subject to the general forfeiture statute. MEPO 1211-26
	X		X							27. Identify the legal standard for searching people and packages entering and leaving federal buildings and installations. [MEPO 1211-27]

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Where EPOs are tested on separate exams (e.g., CTP and ICE-D), the Exam for which the EPOs must be taught are provided.

A. STUDENT SPECIAL REQUIREMENTS:

1. Satisfactory Completion of a Criminal Complaint (Options A - C).
2. Satisfactory Completion of an Affidavit and Application for Search Warrant (Option A)
3. Satisfactory Completion of Fourth Amendment Computer-Based Training Scenarios (Options C and J).
4. Satisfactory Completion of "Probable Cause" laboratory (Option A).

B. METHOD OF EVALUATION:

1. Written, multiple-choice examination.
2. Satisfactory Completion of a Criminal Complaint (Options A - C).
3. Satisfactory Completion of an Affidavit and Application for Search Warrant (Option A).

C. STUDENT SPECIAL REQUIREMENTS:

1. Satisfactory Completion of a Criminal Complaint (Options A-E).
2. Satisfactory Completion of an Affidavit and Application for Search Warrant (Option A)
3. Satisfactor Completion of Fourth Amendment Computer-Based Training Scenarios
4. Satisfactory Completion of "Probable Cause" laboratory (Option A).
5. Students must present an acceptable team generated search warrant application in the 4th hour of instruction for Option M.

D. METHOD OF EVALUATION:

1. Written, multiple-choice examination.
2. Satisfactory Completion of a Criminal Complaint (Options A-E).
3. Satisfactory Completion of an Affidavit and Application for Search Warrant (Option

METHODOLOGIES:

1. Lecture.
2. Classroom Discussion.

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3. Case Briefs.

TRAINING AIDS:

1. Instructor
 - a. Legal Division Handbook [most recent edition]
 - b. Legal Division Reference Book [most recent edition]
 - c. "Warrantless Vehicle Search" Brochure [most recent edition]
 - d. Podcasts – located online at www.fletc.gov/legal/podcasts.
 - e. Student Guide: Preparing Criminal Complaints, Arrest Warrants and Search Warrants [most recent edition]
 - f. Fourth Amendment Practice Exam [www.fletc.gov/training/programs/legal-division/practice-exams]
 - g. Instructional Videos [location unknown]
 - (1) "The Right to Privacy" – Video #33
 - (2) "Informers – Part 1" – Video #141
 - (3) "Chimel – Search Incident to Arrest" – Video #148
 - (4) "Consent Searches – Part 1, Authority to Consent" – Video #215
 - e. Search Warrant Lab Guide
 - f. Fourth Amendment Legal Skills Lab Guide
 - g. Fourth Amendment Computer-Based Skills Lab Guide
 - h. Probable Cause Lab Guide
 - i. Phase 9 (Search Warrant Affidavit PE) Guide
2. Student:
 - a. Legal Division Handbook [most recent edition]
 - b. Legal Division Reference Book [most recent edition]
 - c. "Warrantless Vehicle Search" Brochure [most recent edition]
 - d. Podcasts – located online at www.fletc.gov/legal/podcasts.
 - e. Student Guide: Preparing Criminal Complaints, Arrest Warrants and Search Warrants [most recent edition]
 - f. Fourth Amendment Practice Exam [www.fletc.gov/training/programs/legal-division/practice-exams]

SPECIAL INSTRUCTOR REQUIREMENTS:

NONE

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***** Risk Assessment:** This instruction is delivered in a classroom, typically in Buildings 216, 210, 212, or 261-3. Risk of injury to instructors and students is low. Primary risks are fires, explosions and other dangers requiring that you evacuate the classroom and building.

A. Recommended evacuation procedures:

1. Before beginning class, mentally note the nearest building exit.
2. **If an alarm sounds**, take the following steps:
 - a. Designate [by seat position and pointing] one student at each table to be the “squad leader.” Tell the squad leaders to account for the people at their table after the group reaches the assembly area and report the results to you. Tell everyone else to stay close to their squad leader.
 - b. Direct all students to follow you and take them out the nearest building exit.
 - c. Take them to an assembly area sufficiently far from the building so that you do not interfere with evacuation or emergency response. Keep your group out of the roads and exits around the building.
 - d. Remind the squad leaders to account for their people and report to you.
3. **If no alarm sounds**, but you hear an explosion, smell smoke, etc., take the following steps:
 - a. If the need to evacuate is not apparent, send a student out each room door to find out what is happening. Tell them to return within two minutes and, if they find the room empty, to leave the building by the nearest exit, find you and tell you they’re back.
 - b. If necessary, initiate the evacuation procedures noted in the preceding paragraph.
 - c. Report the situation to **security personnel** by using the following numbers: **2-911; 912-267-2461; or 912-267-2462.**

B. Outdoor Scenario UTP Fourth Amendment Legal Skills Lab: One scenario [bank robbery suspect in an automobile] in this lab is conducted with a car parked in the driveway between Building 216 and the staff parking lot. Ensure that the car is parked [and the role player instructed] to ensure that the scenario stays on the sidewalk and out of the driveway.

OUTLINE OF INSTRUCTION

II. INTRODUCTION

A. THE FOURTH AMENDMENT

1. **The Language.** The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
2. **Two Distinct Clauses.** The Fourth Amendment contains two distinct clauses. See Payton v. New York, 445 U.S. 573, 584 (1980) (“As it was ultimately adopted, however, the Amendment contained two separate clauses, the first protecting the basic right to be free from unreasonable searches and seizures and the second requiring that warrants be particular and supported by probable cause”). The first requires that all searches and seizures be reasonable. See United States v. Jacobsen, 466 U.S. 109, 113 (1984) (Noting that the first clause of the Fourth Amendment “protects two types of expectations, one involving ‘searches,’ the other ‘seizures’”). The second clause mandates that probable cause exist before warrants may be issued, and that search warrants particularly describe the place to be searched and things to be seized.

B. AN OVERVIEW OF THE FOURTH AMENDMENT

1. **Courts Prefer Warrants.** “There is a strong preference for searches and entries conducted under the judicial auspices of a warrant.” United States v. Holloway, 290 F.3d 1331, 1334 (11th Cir. 2002), cert. denied, 537 U.S. 1161 (2003). See, e.g., Illinois v. McArthur, 531 U.S. 326, 338 (2001) (Souter, J., concurring) (“Instead, the legitimacy of the decision to impound the dwelling follows from the law’s strong preference for warrants, which underlies the rule that a search with a warrant has a stronger claim to justification on later, judicial review than a search without one”); United States v. Hodge, 246 F.3d 301, 307 (3rd Cir. 2001) (“A grudging or negative attitude by reviewing courts toward warrants is inconsistent with the Fourth Amendment’s strong preference for searches conducted pursuant to a warrant”).

2. **Warrants Can Save An Otherwise Doubtful Search.** “The resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.” United States v. Ventresca, 380 U.S. 102, 109 (1965). See also, United States v. Leon, 468 U.S. 897, 922 (1984)(“Searches pursuant to a warrant will rarely require any deep inquiry into reasonableness, for a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search”)(internal brackets and citations omitted); Jones v. United States, 362 U.S. 257, 270-271 (1960) (overruled on other grounds)(“In a doubtful case, when the officer does not have clearly convincing evidence of the immediate need to search, it is most important that resort be had to a warrant, so that the evidence in the possession of the police may be weighed by an independent judicial officer, whose decision, not that of the police, may govern whether liberty or privacy is to be invaded”).
3. **Warrantless Searches are Presumed Unreasonable.** It is firmly ingrained in our system of law that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions.” Mincey v. Arizona, 437 U.S. 385, 390 (1978)(emphasis in original) (citation omitted). Thus, while a “defendant normally bears the burden of proving by a preponderance of the evidence that the challenged search or seizure was unconstitutional, where a police officer acts without a warrant, the government bears the burden of proving that the search was valid.” United States v. Waldrop, 404 F.3d 465, 368 (5th Cir. 2005) (internal citations omitted).
4. **No Fourth Amendment Protection for Items Knowingly Exposed to the Public.** “What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.” Katz v. United States, 389 U.S. 347, 351 (1967). Alternatively, “what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.” Id. at 351-352.

III. PRESENTATION

A. EPO #1: RECOGNIZE WHEN THE FOURTH AMENDMENT APPLIES TO GOVERNMENTAL ACTION

1. **General Rule – Addresses Government, Not Private, Action.** In Burdeau v. McDowell, 256 U.S. 465, 475 (1921), the Supreme Court noted that “[t]he Fourth Amendment gives protection against unlawful searches and seizures, and ... its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies” In sum, the Fourth Amendment does not limit private conduct, whether that conduct is reasonable or unreasonable. Skinner v. Railway Labor Executives’ Ass’n, 489 U.S. 602, 614 (1989). See also United States v. Jacobsen, 466 U.S. 109, 113 (1984)(“The Fourth Amendment is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the government or with the participation or knowledge of any government official”)(citation omitted); United States v. Ellyson, 326 F.3d 522, 527 (4th Cir. 2003)(Noting that, because Fourth Amendment regulates only government conduct, “evidence secured by private searches, even if illegal, need not be excluded from a criminal trial”)(quotation omitted).
2. **“Government” Not Limited to Law Enforcement.** The term “government” does not solely refer to law enforcement conduct. Instead, the Fourth Amendment acts as a restraint on the entire government. The Supreme Court “has never limited the [Fourth] Amendment’s prohibition on unreasonable searches and seizures to operations conducted by the police.” New Jersey v. T.L.O., 469 U.S. 325, 335 (1985). See also Linbrugger v. Abercia, 363 F.3d 537, 541 (5th Cir. 2004)(“Generally, the Fourth Amendment’s guarantees apply in both criminal and civil contexts”)(citing Soldal v. Cook County, 506 U.S. 56 (1992)). Accordingly, the Court has held the Fourth Amendment applicable to the activities of civil, as well as criminal, authorities. See, e.g., Camara v. Municipal Court, 387 U.S. 523 (1967)(Building inspectors); Marshall v. Barlow’s, Inc., 436 U.S. 307 (1978)(Occupational Safety and Health Act inspectors); Michigan v. Tyler, 436 U.S. 499 (1978)(Firemen entering privately-owned premises to battle a fire); T.L.O., *supra* (Public school officials); and O’Connor v. Ortega, 480 U.S. 709 (1987)(plurality opinion)(State hospital administrators).
3. **When is a Search “Private”?**
 - a. **Acting While a Government Instrument or Agent Is Not a “Private” Search.** While “a search or seizure by a private party does not implicate the Fourth Amendment ... the Fourth Amendment does apply to a search or seizure by a party (even if otherwise a private party) who is acting as an ‘instrument or agent’ of the government.” United States v. Shahid, 117 F.3d 322, 325 (7th Cir.), *cert. denied*, 522 U.S. 902 (1997).

- b. **“Private” Searches May Become Government Searches Depending on the Degree of Government Participation.** Whether a private search has become governmental “necessarily turns on the degree of the government’s participation in the private party’s activities ... a question that can only be resolved in light of all the circumstances.” Skinner, 489 U.S. at 614-615 (quotation omitted). In making such a determination, the lower courts used mixed approaches, focusing on a variety of factors, including:

- 1) **Whether the government knows of or acquiesces in the private actor’s conduct.**
- 2) **Whether the private party intends to assist law enforcement officers at the time of the search.**
- 3) **Whether the government affirmatively encourages, initiates, or instigates the private action.**

See, e.g., United States v. Pervaz, 118 F.3d 1, 6 (1st Cir. 1997); United States v. Ellyson, 326 F.3d 522, 527 (4th Cir. 2003); United States v. Paige, 136 F.3d 1012, 1017 (5th Cir. 1998); United States v. Lambert, 771 F.2d 83, 89 (6th Cir. 1985); United States v. Shahid, 117 F.3d 322, 325-326 (7th Cir.), cert. denied, 522 U.S. 902 (1997); United States v. Malbrough, 922 F.2d 458, 462 (8th Cir. 1990), cert. denied, 501 U.S. 1258 (1991); United States v. Miller, 688 F.2d 652, 657 (9th Cir. 1982); United States v. Smythe, 84 F.3d 1240, 1242-1243 (10th Cir. 1996).

4. **Lawfulness of Government Search That Follows a Private Search**

- a. **Searching Only What Has Already Been Searched Privately Does Not Implicate the Fourth Amendment.** When a private citizen intrudes into an individual’s property, some portion of the individual’s expectation of privacy has been destroyed. “Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now nonprivate information.” United States v. Jacobsen, 466 U.S. 109, 117 (1984). In sum, “a police view subsequent to a search conducted by private citizens does not constitute a ‘search’ within the meaning of the Fourth Amendment so long as the view is confined to the scope and product of the initial search.” United States v. Runyan, 275 F.3d 449, 458 (5th Cir. 2001). This is because the conduct of the government agents allows them “to learn nothing that had not previously been learned during the private search.” Jacobsen, 466 U.S. at 120.

- b. **Exceeding the Scope of a Private Search Does Implicate the Fourth Amendment.** If the government agents exceed the scope of the private intrusion, a “search” has occurred within the meaning of the Fourth Amendment. Id. at 117 (“The Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated”). See also Walter v. United States, 447 U.S. 649, 657 (1980)(plurality opinion) (Where private search previously conducted, “the Government may not exceed the scope of the private search unless it has the right to make an independent search”); United States v. Rouse, 148 F.3d 1040, 1041 (8th Cir. 1998); United States v. Kinney, 953 F.2d 863, 866 (4th Cir.), cert. denied, 504 U.S. 989 (1992); United States v. Donnes, 947 F.2d 1430, 1434 (10th Cir. 1991).
- c. The Private Search Rationale of **Jacobsen** Will Not Always Extend to Private Searches of Residences. The Sixth Circuit has refused to extend the private search rationale outlined above to private searches of residences. See, e.g., United States v. Allen, 106 F.3d 695, 699 (6th Cir.), cert. denied, 520 U.S. 1281 (1997) (refusing to apply Jacobsen where a motel manager entered the defendant’s motel room and discovered controlled substances, then invited police to enter the room to view the same evidence). “Unlike the package at issue in Jacobsen, which contained ‘nothing but contraband,’ people’s homes contain countless personal, non-contraband possessions. Certainly, a homeowner’s legitimate and significant privacy expectation in these possessions cannot be entirely frustrated simply because, *ipso facto*, a private party (e.g., an exterminator, a carpet cleaner, or a roofer) views some of those possessions.” United States v. Paige, 136 F.3d 1012, 1020 n.11 (5th Cir. 1998), citing Allen, 106 F.3d at 695 (emphasis in original). At least in the Sixth Circuit, therefore, the police would not be authorized to re-enter the home without a warrant to conduct a subsequent viewing of what the private party had previously observed, unless they did so pursuant to consent or exigent circumstances.
- d. The Fifth and Eighth Circuits, however, have held that where the private intrusion is reasonably foreseeable, police may view what the private party has seen without triggering the Fourth Amendment. See, e.g. Paige, 136 F.3d at 1019-1021 (hired roofers summoned police to view marijuana they found in attic while looking for supplies with owner’s permission; no Fourth Amendment search); United States v. Bomengo, 580 F.2d 173 (5th Cir. 1978) (chief engineer of apartment building investigating water leak summoned officer to see two firearms he discovered; no Fourth Amendment search); United States v. Miller, 152 F.3d 813 (8th Cir. 1998) (employee of a halfway house unlocked and opened defendant’s door to locate him and found drugs inside the room; police may enter room to view what employee saw without triggering the Fourth Amendment).

B. EPO #2: IDENTIFY SITUATIONS IN WHICH A REASONABLE EXPECTATION OF PRIVACY EXISTS

1. **General Rule – “Unreasonable Searches” Are Forbidden.** “The Fourth Amendment forbids searches and seizures that are unreasonable.” Terry v. Ohio, 392 U.S. 1, 9 (1967). In Katz v. United States, 389 U.S. 347 (1967), the Supreme Court established that a “search” occurs for Fourth Amendment purposes when the government violates a subjective expectation of privacy that society considers objectively reasonable. Id. at 361 (Harlan, J., concurring). “If the inspection by police does not intrude upon a legitimate expectation of privacy, there is no ‘search’ subject to the Warrant Clause.” Illinois v. Andreas, 463 U.S. 765, 771 (1983).
2. **“Searches” Defined.** A “search” implicating the Fourth Amendment occurs when the government intrudes on an individual’s reasonable expectation of privacy. See Katz, 389 U.S. at 361 (Harlan, J., concurring); Andreas, 463 U.S. at 771; Kyllo v. United States, 533 U.S. 27, 33 (2001) (“A Fourth Amendment search does not occur ... unless ‘the individual manifested a subjective expectation of privacy in the object of the challenged search,’ and ‘society [is] willing to recognize that expectation as reasonable’”); United States v. Ceballos, 385 F.3d 1120, 1123 (7th Cir. 2004) (“To assert a Fourth Amendment claim, an appellant must establish a legitimate expectation of privacy”).
3. **“Reasonable Expectation of Privacy” Defined.** “The Fourth Amendment does not protect privacy in any and all circumstances. Among other limitations, a criminal defendant who wishes to embark upon a Fourth Amendment challenge must show that he had a reasonable expectation of privacy in the area searched and in relation to the items seized.” United States v. Romain, 393 F.3d 63, 68 (1st Cir. 2004) (citation and internal quotation marks omitted). In Katz v. United States, 389 U.S. 347 (1967) (Harlan, J., concurring), the Supreme Court established the standard for determining whether a reasonable expectation of privacy (REP) exists. The test for REP is two-pronged:
 - a. **Subjective Demand.** First, the individual must have exhibited an actual (subjective) expectation of privacy; and,
 - b. **Objectively Reasonable.** Second, that expectation must be one that society is prepared to recognize as reasonable.

If either prong of the test is not met, then no REP exists. For example, "conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable." Katz, 389 U.S. at 361 (Harlan, J., concurring). Further, "what a person knowingly exposes is not constitutionally protected from observation." Id. at 389 U.S. at 363 (Harlan, J., concurring). "Neither are activities or objects which are exposed, regardless of subjective intent, in a manner inconsistent with reasonable expectations of privacy. Thus, it is not a 'search' to observe that which occurs openly in public. Nor is it a search when a law enforcement officer makes visual observations from a vantage point he rightfully occupies. This applies also to perceptions derived from hearing or smelling." United States v. Burns, 624 F.2d 95, 100 (10th Cir.), cert. denied, 449 U.S. 954 (1980)(citations omitted). "The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society." Hoffa v. United States, 385 U.S. 293, 303 (1966)[*citing Lopez v. United States*, 373 U.S. 427, 465 (1963)(Brennan, J., dissenting)].

4. **Ownership Alone Does Not Automatically Justify REP in an Area or Object.** "While property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated, ... property rights are neither the beginning nor the end of this ... inquiry." United States v. Salvucci, 448 U.S. 83, 91 (1980). Thus, "ownership alone does not justify a reasonable expectation of privacy." Shamaeizadeh v. Cunigan, 338 F.3d 535, 544 (6th Cir. 2003). *See also* United States v. Angevine, 281 F.3d 1130, 1134 (10th Cir.), cert. denied, 537 U.S. 845 (2002)("Although ownership of the items seized is not determinative, it is an important consideration in determining the existence and extent of a defendant's Fourth Amendment interests")(citation omitted); United States v. Taketa, 923 F.2d 665, 672 (9th Cir. 1991)(noting that "privacy analysis does not turn on property rights"); Gillard v. Schmidt, 579 F.2d 825, 829 (3d Cir. 1978)("Applicability of the Fourth Amendment does not turn on the nature of the property interest in the searched premises, but on the reasonableness of the person's privacy expectation").
5. **Locations Where REP Exists.** Individuals have been found to have REP in a number of different areas and situations. Listed below are some of the more common ones.

- a. **The Body of the Suspect.** The Supreme Court has made a “distinction between physical evidence below the skin as opposed to outside the skin ... regarding the collection of a variety of categories of physical evidence.” United States v. Nicolosi, 885 F. Supp. 50, 53 (E.D.N.Y. 1995). Further, it must be remembered that “the obtaining of physical evidence from a person involves a potential Fourth Amendment violation at two different levels - the ‘seizure’ of the ‘person’ necessary to bring him into contact with government agents ... and the subsequent search for and seizure of the evidence.” United States v. Dionisio, 410 U.S. 1, 8 (1973). Assuming that the “seizure” of the person is lawful, it must then be determined whether REP exists in the area from which the evidence is to be collected.
- 1) **Intrusions Beneath the Skin Constitute a Search.** It is well-established that “a physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable.” Skinner v. Railway Labor Executives’ Ass’n., 489 U.S. 602, 616 (1989). As noted by the Supreme Court in Schmerber v. California, 384 U.S. 757 (1966): “Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned.... The importance of informed detached and deliberate determinations of the issue whether or not to invade another’s body in search of evidence is indisputable and great.” *Id.* at 770. See also Nicolosi, 885 F. Supp. at 55 (“On the other end of the continuum is a blood sample and presumably other internal fluids which could only be obtained by extracting them from the body. Obtaining such samples requires full compliance with Fourth Amendment procedures”). Thus, a Fourth Amendment “search” occurs when evidence is collected from below the skin of the suspect.
- a) **Blood Sample.** Schmerber, *supra*.
- b) **Bullet Beneath Skin.** Winston v. Lee, 470 U.S. 753 (1985)(Search occurred when bullet was removed from beneath defendant’s skin).
- c) **Urine Sample.** Skinner, 489 U.S. at 617 (Taking of urine samples is a search “because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable”).
- d) **Breathalyzer.** *Id.* at 617-618 (“Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or ‘deep lung’ breath for chemical analysis ... implicates similar concerns about bodily integrity and, like the blood-alcohol test we considered in Schmerber, should also be deemed a search”).

- e) **Fingernail Scrapings.** *Cupp v. Murphy*, 412 U.S. 291, 295 (1973)(Taking of fingernail scrapings constitutes a search).
 - f) **Saliva Sample.** *United States v. Nicolosi*, 885 F. Supp. 50, 56 (E.D.N.Y.1995)(holding that a saliva sample is "properly deemed a search under the Fourth Amendment").
- 2) **Intrusions Above the Skin Do Not Constitute Searches.** In *Katz, supra*, the Supreme Court held that "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Id.* at 351.
- a) **Voice/Handwriting Samples.** "Accordingly, grand jury subpoenas compelling voice samples, *Dionisio*, 410 U.S. at 15, and handwriting samples, *United States v. Mara*, 410 U.S. 19, 21-22 (1973), are not 'searches' and therefore do not implicate the Fourth Amendment." *In re Shabazz*, 200 F. Supp. 2d 578 (D.S.C. 2002). In both cases, the Supreme Court "reasoned that voice and handwriting exemplars are not protected because the Fourth Amendment 'provides no protection for what 'a person knowingly exposes to the public' Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world.'" *In re Grand Jury Proceedings (Mills)*, 686 F.2d 135, 138 (3d Cir.), *cert. denied*, 459 U.S. 1020 (1982)(citations omitted).
 - b) **Fingerprints.** The same is true of fingerprints, in that "fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search." *Davis v. Mississippi*, 394 U.S. 721, 727 (1969)(dicta). *See also In re Grand Jury Proceedings Involving Vickers*, 38 F. Supp. 2d 159, 164 (D.N.H. 1998)(Holding "respondents do not enjoy a constitutionally protected privacy interest in their fingerprints").

- c) **Facial Hair.** Further, an individual has no reasonable expectation of privacy in his facial or head hair. See In re Grand Jury Proceedings (Mills), 686 F.2d 135, 139 (3rd Cir.), cert. denied, 459 U.S. 1020 (1982) ("We conclude that there is no greater expectation of privacy with respect to hair which is on public display than with respect to voice, handwriting or fingerprints..... If fingerprints can be subjected to compelled disclosure by the grand jury without implicating the Fourth Amendment, it follows logically that the hair strands can as well"); In re Grand Jury Proceedings Involving Vickers, 38 F. Supp. 2d 159, 165 (D.N.H. 1998) ("Thus, it follows that the grand jury's request for hair samples, like fingerprints, does not implicate respondents' Fourth Amendment rights"). Of course, an individual will retain an expectation of privacy in bodily hair that is not exposed to the public, such as pubic hair. See Bouse v. Bussey, 573 F.2d 548, 550 (9th Cir. 1977) (Taking of pubic hair sample constituted a search under the Fourth Amendment).
- b. **Vehicles.** Again, an individual's expectation of privacy in a vehicle depends on whether the exterior or interior of the vehicle is being examined. Further, while "a citizen does not surrender all the protections of the Fourth Amendment by entering an automobile," New York v. Class, 475 U.S. 106, 112 (1986), an individual has a "reduced expectation of privacy in an automobile, owing to its pervasive regulation." Pennsylvania v. Labron, 518 U.S. 938, 940 (1996).
 - 1) **No Expectation of Privacy in the Exterior of a Vehicle.** There is no expectation of privacy in the outside, or exterior, of a vehicle. As noted by the Supreme Court: "The exterior of a car, of course, is thrust into the public eye, and thus to examine it does not constitute a 'search.'" Class, 475 U.S. at 114 [citing Cardwell v. Lewis, 417 U.S. 583, 588-89 (1975)]. See also United States v. Rascon-Ortiz, 994 F.2d 749, 754 (10th Cir. 1993) ("The undercarriage is part of the car's exterior, and as such, is not afforded a reasonable expectation of privacy"); United States v. Muniz-Melchor, 894 F.2d 1430 (5th Cir.), cert. denied, 495 U.S. 923 (1990) (Not a search to tap outside of propane tank on a lawfully stopped vehicle); Cardwell v. Lewis, 417 U.S. 583 (1974) (plurality) (not a search to take paint scrapings from a car in a public parking lot and examine its tires).

- 2) **Attaching a Tracking Device to the Exterior of a Vehicle.** The Supreme Court has held that the mere tracking of a vehicle on public streets by means of a similar though less sophisticated device (a beeper) is not a search. United States v. Knotts, 460 U.S. 276, 284-85, 103 S. Ct. 1081, 75 L. Ed. 2d 55 (1983). But the Court left open the question whether installing the device in the vehicle converted the subsequent tracking into a search. Id. at 279 n. 2; see also United States v. Karo, 468 U.S. 705, 713-14, 104 S. Ct. 3296, 82 L. Ed. 2d 530 (1984). The courts of appeals are divided on the issue. The Seventh and Ninth Circuits have held that attaching a tracking device to the exterior of a vehicle is not a search or seizure and need not be supported by any quantum of suspicion. U.S. v. Garcia, 474 F.3d 994 (7th Cir. 2007); United States v. McIver, 186 F.3d 1119, 1127 (9th Cir. 1999). The Fifth Circuit holds that such an intrusion is justified by reasonable suspicion, United States v. Michael, 645 F.2d 252, 256 and n. 11 (5th Cir. 1981) (en banc), while the First, Sixth, and Tenth Circuits require probable cause. United States v. Moore, 562 F.2d 106, 110-12 (1st Cir. 1977); United States v. Bailey, 628 F.2d 938, 944-45 (6th Cir. 1980); United States v. Shovea, 580 F.2d 1382, 1387-88 (10th Cir. 1978).
- 3) **There May Be An Expectation of Privacy in the Interior of the Vehicle.** "While the interior of an automobile is not subject to the same expectations of privacy that exist with respect to one's home, a car's interior as a whole is nonetheless subject to Fourth Amendment protection from unreasonable intrusions by the police." Class, 475 U.S. at 114-115. However, "there is no legitimate expectation of privacy ... shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers." Texas v. Brown, 460 U.S. 730, 740 (1983)(plurality opinion)(citations omitted). See *also* Class, 475 U.S. at 114 (1986)(In discussing vehicle identification numbers (VIN), Court held "it is unreasonable to have an expectation of privacy in an object required by law to be located in a place ordinarily in plain view from the exterior of the automobile").

- 4) **Lawful Vehicle Stops -- Passengers Generally Have No Expectation of Privacy.** "A passenger in a car that he neither owns nor leases typically has no standing to challenge a search of the car." United States v. Baker, 221 F.3d 438, 441-442 (3rd Cir. 2000)(citation omitted). See also Rakas v. Illinois, 439 U.S. 128, 143 (1978)("There is no legitimacy to a defendant's expectations of privacy where the area searched is in the control of a third party"); United States v. Barragan, 379 F.3d 524, 530 (8th Cir. 2004)(Court note that "mere passenger" had no expectation of privacy in vehicle where passenger's name did not appear on any ownership documents and passenger admitted having no ownership interest vehicle); Of course, a passenger will retain an expectation of privacy in any personal property that he or she has brought into the car with them. See, e.g., United States v. Welch, 4 F.3d 761, 764 (9th Cir. 1993) (While passenger had diminished expectation of privacy in the vehicle, she still maintained expectation of privacy in her purse, because it was "independently the subject of such expectations"); United States v. Buchner, 7 F.3d 1149, 1154 (5th Cir. 1993)("The owner of a suitcase located in another's car may have a legitimate expectation of privacy with respect to the contents of his suitcase").
- 5) **Unlawful Vehicle Stops – Passenger's Right to Challenge a Resulting Search.** A law enforcement officer's stop of an automobile results in a seizure of both the driver and the passenger(s). Brendlin v. California, 127 S. Ct. 2400 (2007). Thus, If either the stopping of the car, the length of the passenger's detention thereafter, or the passenger's removal from it are unreasonable in a Fourth Amendment sense, then the passenger has standing to object to those constitutional violations and to have suppressed any evidence found in the car which is their fruit. Id. at 2408 (citations omitted).
- 6) **Individuals Listed on Rental Agreements Have An Expectation of Privacy in Rental Vehicles.** "A person listed on a rental agreement as an authorized driver has a protected Fourth Amendment interest in the vehicle and may challenge a search of the rental vehicle." United States v. Walker, 237 F.3d 845, 849 (7th Cir. 2001). See also United States v. Henderson, 241 F.3d 638, 646 (9th Cir. 2000), cert. denied, 532 U.S. 986 (2001) ("Henderson clearly had a reasonable expectation of privacy in the car because he was a lessee"). The driver retains an expectation of privacy in the rental car even if he keeps the car beyond the contract expiration date, unless the rental company has taken affirmative steps to reclaim the vehicle. U.S. v. Henderson, 241 F.3d 638 (9th Cir. 2000) (Eleventh Circuit agrees).

7) **The Courts Are Split on Whether an Individual Who is Not Listed on the Rental Agreement has an Expectation of Privacy.**

Several circuits have addressed the issue of whether an unauthorized driver has an expectation of privacy in a rental car.

- a) **REP With Permission.** “At least two courts have held that if the driver of a rental car has the permission of the lessee to drive the vehicle, then he has a legitimate possessory interest and accompanying expectation of privacy sufficient to establish standing to attack an unlawful search of the vehicle.” United States v. Little, 945 F. Supp. 79, 83 (S.D.N.Y. 1996), aff’d, 133 F.3d 908 (2d Cir. 1998). See United States v. Muhammad, 58 F.3d 353, 355 (8th Cir. 1995); United States v. Best, 135 F.3d 1223, 1225 (8th Cir. 1998); United States v. Kye Soo Lee, 898 F.2d 1034, 1038 (5th Cir. 1990), cert. denied, 506 U.S. 1083 (1993)].
- b) **No REP If Not Authorized Driver.** Three circuit courts have reached a different conclusion. “The Fourth, Tenth, and Eleventh Circuits ... have looked solely to the rental agreement, holding that a driver who is not authorized by the rental company to operate the car does not have standing.” United States v. Haywood, 324 F.3d 514, 516 (7th Cir. 2003). See United States v. Wellons, 32 F.3d 117, 119 (4th Cir. 1994), cert. denied, 513 U.S. 1157 (1995); United States v. Roper, 918 F.2d 885, 887-88 (10th Cir. 1990); United States v. McCulley, 673 F.2d 346, 352 (11th Cir.), cert. denied, 459 U.S. 852 (1982).
- c) **One Circuit Applies a Fact-Based Approach.** In United States v. Smith, 263 F.3d 572 (6th Cir. 2001), the Sixth Circuit noted that, “as a general rule, an unauthorized driver of a rental vehicle does not have a legitimate expectation of privacy in the vehicle, and therefore does not have standing to contest the legality of a search of the vehicle.” Id. at 586. Nevertheless, the court refused “to adopt a bright line test ... based solely on whether the driver of a rental vehicle is listed on the rental agreement as an authorized driver.” Id. Instead, said the court, whether an expectation of privacy exists must be determined by looking at all of the facts of a given case.

- c. **Homes.** An individual has a high expectation of privacy within the confines of his or her home. In fact, the Supreme Court has repeatedly emphasized that the warrantless entry and search of a home is "the chief evil against which the ... Fourth Amendment is directed." United States v. United States Dist. Court for Eastern Dist. of Mich., 407 U.S. 297, 313 (1972). See also Silverman v. United States, 365 U.S. 505, 511 (1961)("At the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion"); Mincey v. Arizona, 437 U.S. 385, 393 (1978)("The Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law"); Wilson v. Layne, 526 U.S. 603, 610 (1999)("The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home"). "With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." Kyllo v. United States, 533 U.S. 27, 31 (2001)(citations omitted).
- 1) **Third Party's Home.** The Supreme Court has held that, "in some circumstances a person may have a legitimate expectation of privacy in the house of someone else." Minnesota v. Carter, 525 U.S. 83, 89 (1998). In such cases, the purpose behind the visitor being at the home is the determining factor in whether an expectation of privacy exists.

- a) **Overnight Guests and Social Visitors Can Have an Expectation of Privacy.** "A visitor usually lacks a rightful expectation of privacy when present in the home of another - unless the visitor stays overnight." United States v. Sturgis, 238 F.3d 956, 958 (8th Cir.), cert. denied, 534 U.S. 880 (2001)(citing Carter, 525 U.S. at 89-91). See also Minnesota v. Olson, 495 U.S. 91, 96-97 (1990) ("We need go no further than to conclude, as we do, that Olson's status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable"). Similarly, "a social guest's expectation of privacy is constitutionally protected." United States v. Rhiger, 315 F.3d 1283, 1287 (10th Cir. 2003). See also United States v. Kimoana, 383 F.3d 1215, 1221 (10th Cir. 2004)("Overnight guests and joint occupants of motel rooms possess reasonable expectations of privacy in the property on which they are staying"); United States v. Pollard, 215 F.3d 643, 647-48 (6th Cir.), cert. denied, 531 U.S. 999 (2000) (Defendant had reasonable expectation of privacy in premises where he had friendship with homeowner, occasionally spent night at residence, kept some personal belongings there, and was permitted to be in home while owners were absent).
- b) **Commercial Visitors Generally Has No Expectation of Privacy in a Third Party's Home.** While an "overnight guest" may have a reasonable expectation of privacy in a third party's home, a commercial visitor may not. "A visitor to another's home for commercial purposes retains only a limited privacy interest, because an expectation of privacy in commercial premises is different from, and indeed less than, a similar expectation in an individual's home." Sturgis, 238 F.2d at 958 (internal quotation and citation omitted). See also Carter, 525 U.S. at 91 (Court held commercial visitor has no expectation of privacy because of "the purely commercial nature of the transaction engaged in ..., the relatively short period of time on the premises, and the lack of any previous connection between respondents and the householder"); Rhiger, 3315 F.3d at 1291-92 (Noting "an individual does not possess an expectation of privacy to challenge the search of another's property when he or she is present solely for commercial or business reasons").

- 2) **Hotel/Motel Rooms.** “No less than a tenant of a house, or the occupant of a room in a boarding house, a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures.” Stoner v. California, 376 U.S. 483, 490 (1964)(internal citation omitted). See *also*, United States v. Gordon, 168 F.3d 1222, 1226 (10th Cir.), *cert. denied*, 527 U.S. 1030 (1999)(“An individual may have a reasonable expectation of privacy in a motel room”); United States v. Nerber, 222 F.3d 597, 600 n.2 (9th Cir. 2000)(“For Fourth Amendment purposes, a hotel room is treated essentially the same, if not exactly the same, as a home”).
- a) **Establishing an Expectation of Privacy in a Hotel/Motel Room.** In determining whether a defendant established an expectation of privacy in a motel room, courts have examined various factors, including:
- (1) **Whether “a defendant demonstrate[d] that he was the registered occupant of the room,”** Gordon, 168 F.3d at 1226;
 - (2) **Whether the defendant “was sharing [the room] with the person to whom the room was registered,”** Id.;
 - (3) **Whether the defendant ever checked into the room,** United States v. Carter, 854 F.2d 1102, 1105-06 (8th Cir. 1988);
 - (4) **Whether the defendant paid for the room,** Id. at 1106;
 - (5) **Whether the defendant had the ability to control or exclude others’ use of the property,** Id. at 1105.

b) **An Expectation of Privacy in a Hotel/Motel Room Generally Expires at Checkout Time.** “As a general rule, a defendant’s expectation of privacy in a hotel room expires at checkout time.” United States v. Dorais, 241 F.3d 1124, 1129 (9th Cir. 2001). *See also*, United States v. Kitchens, 114 F.3d 29, 31 (4th Cir. 1997); United States v. Allen, 106 F.3d 695, 699 (6th Cir.), *cert. denied*, 520 U.S. 1281 (1997); United States v. Rahme, 813 F.2d 31, 34 (2d Cir. 1987). Nonetheless, “a guest may still have a legitimate expectation of privacy even after his rental period has terminated, if there is a pattern or practice which would make that expectation reasonable.” Kitchens, 114 F.3d at 32. *See also* Dorais, 241 F.3d at 1129 (“The policies and practices of a hotel may result in the extension past checkout time of a defendant’s reasonable expectation of privacy”); United States v. Cunag, 386 F.3d 888, 895 (9th Cir. 2004) (Noting that, “whether a hotel patron retains a reasonable expectation of privacy in his hotel room depends on whether or not management had justifiably terminated the patron’s control of the room through private acts of dominion”)(citation and internal quotations marks omitted).

3) **There is Ordinarily No Expectation of Privacy in the Common Areas of Hotels, Motels, and Apartment Buildings.** Six of the seven circuits “that have decided the issue have concluded that tenants do not have a reasonable expectation of privacy in the common areas of their apartment building.” United States v. Miravalles, 280 F.3d 1328, 1331 (11th Cir. 2002). *See, e.g.*, United States v. Paradis, 351 F.3d 21, 31 (1st Cir. 2003)(Noting defendant had no privacy interest in bag of ammunition left on back porch of building because “he had no expectation of privacy in the common areas of a multi-family building,” which in this case was an apartment building); United States v. Nohara, 3 F.3d 1239, 1241-42 (9th Cir. 1993)(Apartment hallway); United States v. Concepcion, 942 F.2d 1170, 1171-72 (7th Cir. 1991)(Apartment common areas); United States v. Barrios-Moriera, 872 F.2d 12, 14-15 (2d Cir. 1989) (Apartment hallway), *overruled on other grounds by* Horton v. California, 496 U.S. 128 (1990); United States v. Eisler, 567 F.2d 814, 816 (8th Cir. 1977) (Apartment hallway); United States v. Cruz Pagan, 537 F.2d 554, 558 (1st Cir. 1976). “The only circuit that has recognized a reasonable expectation of privacy in the common areas of an apartment building, at least when the door is locked, is the Sixth Circuit.” Miravalles, 280 F.3d at 1332. *See* United States v. Carriger, 541 F.2d 545, 550 (6th Cir. 1976) (Apartment common areas).

- d. **Containers.** “The Supreme Court has long recognized that individuals have an expectation of privacy in closed containers....” United States v. Runyan, 275 F.3d 449, 464 (5th Cir. 2001)(citations omitted). *See, e.g.*, United States v. Ross, 456 U.S. 798, 822-23 (1982)(“The Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view”); United States v. Jacobsen, 466 U.S. 109, 114 (1984)(“Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy”); United States v. Fultz, 146 F.3d 1102, 1105 (9th Cir. 1998) (“A person has an expectation of privacy in his or her private, closed containers”).
- 1) **Destroying Expectation of Privacy in a Container Through a Private Search.** While an individual can have a reasonable expectation of privacy in a container, that expectation can be destroyed “if that container was opened and examined by private searchers.” Runyan, 275 F.3d at 465. *See also*, Jacobsen, 466 U.S. at 119(Holding that “agent’s viewing of what a private party had freely made available for his inspection did not violate the Fourth Amendment”). “Thus, the police do not engage in a new ‘search’ for Fourth Amendment purposes each time they examine a particular item found within the container.” Runyan, 275 F.3d at 465. This issue is discussed more fully in **EPO #1**.
 - 2) **No Expectation of Privacy in Containers That Reveal Their Contents.** As a general rule, “for there to be a reasonable expectation of privacy, the contents of a container should not be apparent without opening.” United States v. Knoll, 16 F.3d 1313, 1321 (2d Cir. 1994), *cert. denied*, 522 U.S. 1118 (1998). *See also* United States v. Villarreal, 963 F.2d 770, 773 (5th Cir. 1992)(“Individuals can manifest legitimate expectations of privacy by placing items in closed, opaque containers **that conceal their contents from plain view**”)(emphasis added). “Thus, when a container is ‘not closed,’ or ‘transparent,’ or when its ‘distinctive configuration ... proclaims its contents,’ the container supports no reasonable expectation of privacy and the contents can be said to be in plain view.” United States v. Donnes, 947 F.2d 1430, 1437 (10th Cir. 1991).

- e. **Curtilage and "Open Fields"**. Throughout its history, the Supreme Court has stressed "the overriding respect for the sanctity of the home that has been embedded ... since the origins of the Republic." Oliver v. United States, 466 U.S. 170, 178 (1984)(citations omitted). Included within the protections afforded a home are those areas that fall within a home's "curtilage," but not those areas of an individual's property that are considered "open fields." See, e.g., United States v. Gerard, 362 F.3d 484, 487 (8th Cir. 2004)("The Fourth Amendment protects a home and its curtilage - the area immediately surrounding a dwelling house - from unreasonable warrantless searches"); United States v. Cavely, 318 F.3d 987, 995 (10th Cir. 2003)("The protections of the Fourth Amendment may extend beyond the home itself").
- 1) **Curtilage Defined**. "Curtilage" has been defined as "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" Oliver, 466 U.S. at 180. As such, curtilage "has been considered part of the home itself for Fourth Amendment purposes," id., and an individual has a reasonable expectation of privacy in the curtilage surrounding a dwelling. See also United States v. French, 291 F.3d 945, 951 (7th Cir. 2002) (Defining a home's "curtilage" as "the area outside the home itself but so close to and intimately connected with the home and the activities that normally go on there that it can reasonably be considered part of the home").
 - 2) **Open Fields Defined**. Alternatively, "open fields" have been defined as "any unoccupied or undeveloped area outside of the curtilage." Id. "No expectation of privacy legitimately attaches to open fields." Id. The phrase "open fields" is somewhat misleading, in that "an open field need be neither 'open' nor a 'field' as those terms are used in common speech." Id. So, for example, "a thickly wooded area nonetheless may be an open field as that term is used in construing the Fourth Amendment." Id.
 - 3) **Evaluating Whether Property is Curtilage**. "For most homes, the boundaries of the curtilage will be clearly marked; and the conception defining the curtilage - as the area around the home to which the activity of home life extends - is a familiar one easily understood from our daily experience." United States v. Dunn, 480 U.S. 294, 302 (1987)(citation omitted). This will not always be the case, however, especially in more rural settings. See, e.g., United States v. Reilly, 76 F.3d 1271, 1277 (2d Cir. 1996)("In a modern urban multifamily apartment house, the area within the 'curtilage' is necessarily much more limited than in the case of a rural dwelling subject to one owner's control").

- a) **Four Factors Are Considered in Determining Whether An Area is Part of a Home's Curtilage.** Accordingly, in Dunn, *supra*, the Supreme Court announced four factors that must be considered when determining whether a given area is part of a home's curtilage. In utilizing these four factors, however, the Court has emphasized to the lower courts that these factors are not to be "mechanically applied," *id.* at 301, but are useful "only to the degree that, in any given case, they bear upon the centrally relevant consideration - whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *Id.*
- (1) **Proximity.** First, the proximity of the area claimed to be curtilage to the home must be considered. Courts have repeatedly refused to fix a specific distance at which curtilage ends. See, e.g., French, 291 F.3d at 952 ("A curtilage line 'cannot be located merely by taking measurements from some other case or precedent and then by use of a tape measure trying to determine where the curtilage is in a different case'") [*citing United States v. Redmon*, 138 F.3d 1109, 1112 (7th Cir. 1998)(en banc), *cert. denied*, 525 U.S. 1066 (1999)]; Reilly, 76 F.3d at 1277 ("On a large parcel of land, a pond 300 feet away from a dwelling may be as intimately connected to the residence as is the backyard grill of the bloke next door"); United States v. Van Dyke, 643 F.2d 992, 994 (4th Cir. 1981) ("Distance is just one of many factors to be weighed when determining the reach of the curtilage").

- (2) **Common Enclosure.** Second, courts must consider whether the area in question is included within a single enclosure surrounding the home. "Fencing configurations are important factors in defining the curtilage." Dunn, 480 U.S. at 301 n.4. These "fencing" configurations may be artificial or natural. See, e.g., Hart v. Myers, 183 F. Supp. 2d 512, 523 (D. Conn. 2002) ("Natural 'barriers satisfy the requirements of an enclosure'"); Williams v. Garrett, 722 F. Supp. 254, 261 (W.D. Va. 1989) ("Requiring a person to expend resources and sacrifice aesthetics by building a fence in order to obtain protection from unreasonable searches is not required by the constitution"). Typically, the enclosure factor weighs against those who claim infringement of the curtilage when their land is divided into separate parts by internal fencing." Reilly, 76 F.3d at 1278. For example, in Dunn, *supra*, there was an internal fence separating the barn from the home. According to the Court, this fence "serve[d] to demark a specific area of land immediately adjacent to the house that is readily identifiable as part and parcel of the house." Dunn, 480 U.S. at 302. Thus, "the proper focus of this factor is on whether interior fencing clearly demarcates the curtilage." United States v. Traynor, 990 F.2d 1153, 1158 (9th Cir. 1993). However, "the Supreme Court has rejected a bright line rule that 'the curtilage should extend no farther than the nearest fence surrounding a fenced house.'" Hart, 183 F. Supp. at 523.

- (3) **Use.** Third, the nature of the uses to which the area is put is a factor that must be taken into account. In Dunn, supra, the Court found it "especially significant that the law enforcement officials possessed objective data indicating that the barn was not being used for intimate activities of the home." Dunn, 480 U.S. at 302. "[T]his factor requires consideration of whether the property is used to 'harbor those intimate activities associated with domestic life and the privacies of home.'" Hart, 183 F. Supp. at 523 (citation omitted). See, e.g., Gerard, 362 F.3d at 488 (In case involving a detached garage, court noted: "We believe that reasonable officers would expect that the garage was likely to be used for private activities. The garage's doors were locked, electricity was wired to the garage, and it was close to the farmhouse, which are typical signs of private activities").
- (4) **Steps Taken to Prevent Observation.** Finally, the steps taken by the resident to protect the area from observation by people passing by are to be considered in the analysis. For example, "No Trespassing" signs may be significant as an effort to protect the inner areas of a parcel of land from observation. However, this fact is not, in and of itself, dispositive of the curtilage issue. See, e.g., Oliver, 466 U.S. at 183 n.13 ("Certainly the Framers did not intend that the Fourth Amendment should shelter criminal activity wherever persons with criminal intent choose to erect barriers and post 'No Trespassing' signs"); Gerard, 362 F.3d at 488 (In finding that garage was not within curtilage of home, court noted that, "[n]o internal fences prevented persons from approaching the garage. Also, Gerard posted no signs excluding strangers from access to the garage. Gerard did nothing to cover the marijuana odor escaping from the vent of the garage. Lastly, the garage was not completely blocked from view of members of the public driving down the street"); United States v. Roberts, 811 F. Supp. 21, 23 (D. Me. 1993)("No trespassing signs do not confer a reasonable expectation of privacy in activities taking place in otherwise open fields").
- 4) **Miscellaneous Issues Regarding Curtilage and Open Fields.** The following issues regarding curtilage and open fields have been addressed to varying degrees by a number of different courts.

- a) **Driveways and Walkways.** “[D]riveways that are readily accessible to visitors are not entitled to the same degree of Fourth Amendment protection as are the interiors of defendants’ houses.” United States v. Reyes, 283 F.3d 446, 465 (2d Cir.), cert. denied, 537 U.S. 822 (2002)(collecting cases). *See also* Rogers v. Vicuna, 264 F.3d 1, 5 (1st Cir. 2001) (Noting “a person does not have a reasonable expectation of privacy in a driveway that was visible to the occasional passerby”)(citation omitted); Maisano v. Welcher, 940 F.2d 499, 503 (9th Cir. 1991), cert. denied sub nom. Maisano v. IRS, 504 U.S. 916 (1992)(“In order to establish a reasonable expectation of privacy in their driveway, the plaintiffs must support that expectation by detailing the special features of the driveway itself (i.e. enclosures, barriers, lack of visibility from the street) or the nature of activities performed upon it”); United States v. Smith, 783 F.2d 648, 650 (6th Cir. 1986)(No reasonable expectation of privacy in driveway accessible and visible from public highway); United States v. Ventling, 678 F.2d 63, 66 (8th Cir. 1982) (Because “a driveway and portion of the yard immediately adjacent to the front door of the residence can hardly be considered out of public view,” extending privacy protections would not be reasonable).

- (1) **Entry By Law Enforcement Officers Onto Private Property.** "Law enforcement officers may encroach upon the curtilage of a home for the purpose of asking questions of the occupants." United States v. Hammett, 236 F.3d 1054, 1059 (9th Cir. 2001), cert. denied, 534 U.S. 866 (2001). Accordingly, "[w]hen the police come on to private property to conduct an investigation ... and restrict their movements to places visitors could be expected to go (e.g., walkways, driveways, porches), observations made from such vantage points are not covered by the Fourth Amendment." United States v. Hatfield, 333 F.3d 1189, 1194 (10th Cir. 2003)(citation omitted). *See also* United States v. Carter, 360 F.3d 1235, 1239 (10th Cir. 2004)(No search or seizure occurred where officers drove by the defendant's house twice, parked nearby, walked up the driveway, and shone their flashlights into a car in the driveway); United States v. Taylor, 90 F.3d 903, 909 (4th Cir. 1996)("Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned violation of the person's right of privacy, for any one openly and peaceably ... to walk up the steps and knock on the front door of any man's 'castle' ... whether the questioner be a pollster, a salesman, or an officer of the law")(citation omitted).
- (2) **Observations Made While Approaching a Person's Front Door.** Additionally, "officers walking up to the front door of a house can look inside through a partially draped open window without conducting a Fourth Amendment search." United States v. Garcia, 997 F.2d 1273, 1279 (9th Cir. 1993). *See also* Taylor, 90 F.3d at 909 (Holding that observations by law enforcement officers into a dining room through a window adjacent to front door did not constitute a search within the meaning of the Fourth Amendment because, by "expos[ing] their dining room and its contents to anyone positioned at the front entranceway of their home, the Taylors possessed no reasonable expectation of privacy in the dining room or its openly visible contents").

b) **Officers May Move Around the House in a Good Faith Effort to Contact a Resident.** Various courts have recognized "that officers must sometimes move away from the front door when they are attempting to contact the occupants of a residence." Garcia, 997 F.2d at 1279. See United States v. Daoust, 916 F.2d 757, 758 (1st Cir. 1990)(Held that, if the front door to the residence is inaccessible, "there is nothing unlawful or unreasonable about going to the back of the house to look for another door, all as part of a legitimate attempt to interview a person"); United States v. Anderson, 552 F.2d 1296, 1300 (8th Cir. 1977) ("We cannot say that the agents' action in proceeding to the rear after receiving no answer at the front door was so incompatible with the scope of their original purpose that any evidence inadvertently seen by them must be excluded as the fruit of an illegal search"); Hammett, 236 F.3d at 1060 ("To the extent our previous holdings have failed squarely to resolve this issue, we now make it clear that an officer may, in good faith, move away from the front door when seeking to contact the occupants of a residence"). In such situations, "the subsequent discovery of evidence in plain view does not (generally) violate the Fourth Amendment." Garcia, 997 F.2d at 1279.

f. **Government Employees May Have An Expectation of Privacy in Government Workspaces.** In O'Connor v. Ortega, 480 U.S. 709 (1987)(plurality opinion), the Supreme Court addressed whether a government employee may establish a reasonable expectation of privacy in a government workspace. In sum, government employees can, and often do, establish expectations of privacy in their government offices, filing cabinets, and computers. See McGregor v. Greer, 748 F. Supp. 881, 888 (D.D.C. 1990) (Reiterating O'Connor's holding that "a government employee may be entitled to a reasonable expectation of privacy in her office"). As a general rule, "where a public employee has [his or] her own office or desk which co-workers and superiors normally do not enter, and where no agency policy or regulation warns the employee that an expectation of privacy is unreasonable, an expectation of privacy may be reasonable." Id. Nonetheless, a government employee's expectation of privacy is limited by the "operational realities of the workplace," O'Connor, 480 U.S. at 717, and "whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis." Id. at 718. In determining whether a government employee has a reasonable expectation of privacy in his or her workspace, courts have utilized a variety of factors. Among the most important are the following:

- 1) **Prior Notice to the Employee May Destroy an Expectation of Privacy.** "In general, government employees who are notified that their employer has retained rights to access or inspect information stored on the employer's computers can have no reasonable expectation of privacy in the information stored there." *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations*, Computer Crime and Intellectual Property Section, Criminal Division, Department of Justice, at 41 (March 2001). This is consistent with the Supreme Court's holding in O'Connor that an employee's expectation of privacy can be reduced through "legitimate regulation." O'Connor, 480 U.S. at 717. See, e.g., United States v. Thorn, 375 F.3d 679, 683 (8th Cir. 2004)(Noting the defendant "did not have any legitimate expectation of privacy with respect to the use and contents of his [government] computer," because he was "fully aware of the computer-use policy, as evidenced by his written acknowledgment of the limits imposed on his computer-access rights in 2000"); United States v. Simons, 206 F.3d 392, 398 (4th Cir. 2000)(Where "policy placed employees on notice that they could not reasonably expect that their Internet activity would be private," the employee "did not have a legitimate expectation of privacy with regard to the record or fruits of his Internet use").

- 2) **Common Practices and Procedures May Destroy an Expectation of Privacy.** In O'Connor, the Supreme Court recognized that "public employees' expectations of privacy in their offices, desks, and file cabinets ... may be reduced by virtue of actual office practices and procedures" O'Connor, 480 U.S. at 717. See also Gillard v. Schmidt, 579 F.2d 825, 829 (3rd Cir. 1978)(Holding that "an employer may conduct a search in accordance with a regulation or practice that would dispel in advance any expectations of privacy")(citation omitted). Alternatively, common office practices and procedures may permit a government employee to establish an expectation of privacy in an area where one would otherwise not exist. See, e.g., United States v. Speights, 557 F.2d 362, 364 (3rd Cir. 1977) (Search of locker impermissible where, *inter alia*, "no regulation and no police practice" existed to justify the search); United States v. Donato, 269 F. Supp. 921, 923 (E.D. Pa.), *aff'd*, 379 F.2d 288 (3rd Cir. 1967) (Search of a locker maintained by an employee of the United States Mint upheld because, among other things, the locker was "regularly inspected by the Mint security guards for sanitation purposes"); Shaffer v. Field, 339 F. Supp. 997, 1003 (C.D. Cal. 1972), *aff'd*, 484 F.2d 1196 (9th Cir. 1973)(Search of a police officer's locker upheld in part because three previous searches had been conducted in the past); United States v. Taketa, 923 F.2d 665, 673 (9th Cir. 1991) (Holding that government employee had a reasonable expectation of privacy in his office because, *inter alia*, the office was "not open to the public and was not subjected to regular visits of inspection by DEA personnel"); Schowengerdt v. United States, 944 F. 2d 483, 488 (9th Cir. 1991)(Holding no reasonable expectation of privacy in office or credenza due to "extremely tight security procedures," to include "frequent scheduled and random searches by security guards").

- 3) **Openness and Accessibility May Destroy an Expectation of Privacy.** Courts will often look to the openness or accessibility of a workspace to determine whether an expectation of privacy can be sustained. Among the factors that are considered are “the employee’s relationship to the item seized; whether the item was in the immediate control of the employee when it was seized; and whether the employee took actions to maintain his privacy in the item.” United States v. Angevine, 281 F.3d 1130, 1134 (10th Cir.), cert. denied, 537 U.S. 845 (2002). The more accessible the item or area is to others, the less likely it is an individual employee’s claim of privacy would be accepted. See, e.g., Thorn, 375 F.3d at 684 (Employee’s reasonable expectation of privacy in office, desk and filing cabinet “was limited in scope because other DCSE employees had keys that allowed them to access the office and the contents of the desk and cabinets”). The more the item or area in question was given over to an employee’s exclusive use, the more likely an expectation of privacy would be found. As a general rule, “where a public employee has his or her own office or desk which co-workers and superiors normally do not enter, and where no agency policy or regulation warns the employee that an expectation of privacy is unreasonable, an expectation of privacy may be reasonable.” McGregor, 748 F. Supp. at 888. Offices that are “continually entered by fellow employees and other visitors during the workday for conferences, consultations, and other work-related visits ... may be so open to fellow employees or the public that no expectation of privacy is reasonable.” O’Connor, 480 U.S. at 717-718 (plurality). “Ordinarily, business premises invite lesser privacy expectations than do residences.” Vega-Rodriguez v. Puerto Rico Telephone Company, 110 F.3d 174, 178 (1st Cir. 1997)[citing G.M. Leasing Corp. v. United States, 429 U.S. 338, 353 (1977)]. Where areas are, by their very nature, “open” and “public,” no reasonable expectation of privacy can exist in that area. See Thompson v. Johnson County Community College, 930 F. Supp. 501, 507 (D. Kan. 1996)(“Security personnel and other college employees, including maintenance and service personnel, had unfettered access to this storage room. Consequently, defendants argue that the open, public nature of the security personnel locker area defeats any reasonable expectation of privacy in this area. The court agrees”). For example, where an unlocked desk or credenza was located in an “open, accessible area,” no reasonable expectation of privacy was found to exist. O’Bryan v. KTVI Television, 868 F. Supp. 1146, 1159 (N.D. Iowa 1994). Nonetheless, the existence of a master key will not defeat an employee’s expectation of privacy in his or her office. Taketa, 923 F.2d at 673 (“Furthermore, the appellants correctly point out that allowing the existence of a master key to overcome the expectation

of privacy would defeat the legitimate privacy interest of any hotel, office, or apartment occupant"). Nor does an employee's failure to consistently shut and lock the office door automatically sacrifice any expectation of privacy in that area. Id. ("Nor was the expectation of privacy defeated by O'Brien's failure to shut and lock his doors at all times"). Just because others may be permitted access to an employee's office does not automatically destroy the employee's privacy expectation.

- 4) **Position of the Employee May Destroy an Expectation of Privacy.** In determining whether a reasonable expectation of privacy exists, courts will consider the position occupied by the employee who was the subject of the workplace search. This is especially true where the subject of the search is a law enforcement officer. Law enforcement officers do not lose their Constitutional rights by virtue of accepting their position. Garrity v. State of New Jersey, 385 U.S. 493, 500 (1967)(Law enforcement officers "are not relegated to a watered-down version of Constitutional rights"). Nonetheless, there is a "substantial public interest in ensuring the appearance and actuality of police integrity," in that "a trustworthy police force is a precondition of minimal social stability in our imperfect society." Biehunik v. Felicetta, 441 F.2d 228, 230 (2d Cir. 1971). This "interest in police integrity ... may justify some intrusions on the privacy of police officers which the Fourth Amendment would not otherwise tolerate." Kirkpatrick v. City of Los Angeles, 803 F.2d 485, 488 (9th Cir. 1986). See, e.g., Biehunik, 441 F.2d at 231 (Court noted, "policemen, who voluntarily accept the unique status of watchman of the social order, may not reasonably expect the same freedom from governmental restraints which are designed to ensure his fitness for office as from similar governmental actions not so designed"); Sheppard v. Beerman, 18 F.3d 147, 152 (2d Cir. 1994)(Law clerk had no reasonable expectation of privacy in desk based upon the unique "working relationship between a judge and her clerk").

- 5) **An Employee May Waive an Expectation of Privacy.** Occasionally, a government employee may actually waive his or her expectation of privacy as a precondition of receiving a certain benefit from their employer. For example, in American Postal Workers Union v. United States Postal Service, 871 F.2d 556 (6th Cir. 1989), postal employees were eligible to receive personal lockers at their postal facility. Before being allowed to do so, however, each employee had to sign a waiver that noted the locker was "subject to inspection at any time by authorized personnel." Id. at 557. Further, the administrative manual of the Postal Service noted that all property provided by the Postal Service was "at all times subject to examination and inspection by duly authorized postal officials in the discharge of their official duties." Id. Finally, the collective bargaining agreement for these employees "provided for random inspection of lockers under specified circumstances." Id. As noted by the court: "In light of the clearly expressed provisions permitting random and unannounced locker inspections under the conditions described above, the collective class of plaintiffs had no reasonable expectation of privacy in their respective lockers that was protected by the Fourth Amendment." Id. at 560.

- g. **There is No Expectation of Privacy in Abandoned Property.** Abandoned property is not subject to Fourth Amendment protection. Abel v. United States, 362 U.S. 217, 241 (1960). Accordingly, an individual does not have a reasonable expectation of privacy in property that he or she has abandoned. See, e.g., United States v. Tugwell, 125 F.3d 600, 602 (8th Cir. 1997), cert. denied, 522 U.S. 1061 (1998) ("A warrantless search of abandoned property is constitutional because 'any expectation of privacy in the item searched is forfeited upon its abandonment'"). "The test for abandonment is whether an individual has retained any reasonable expectation of privacy in the object. This determination is to be made by objective standards. An expectation of privacy is a question of intent which may be inferred from words spoken, acts done, or other objective facts." United States v. Rem, 984 F.2d 806, 810 (7th Cir.), cert. denied, 510 U.S. 913 (1993). See also United States v. Garzon, 119 F.3d 1446, 1449 (10th Cir. 1997) (Same) "[T]he individual is treated as having abandoned an object if it would be unreasonable in the circumstances for the person to have an expectation of privacy with respect to that object." United States v. Burbage, 365 F.3d 1174, 1178 (10th Cir. 2004).

- 1) **There are Two General Means of Abandoning Property.** As a general rule, abandonment takes place when an individual relinquishes any expectation of privacy in an object, either through word or deed. See United States v. Cofield, 272 F.3d 1303, 1306 (11th Cir. 2001) (“An individual who abandons or denies ownership of personal property may not contest the constitutionality of its subsequent acquisition by the police”).
- a) **Abandonment May Occur Through a Denial of Ownership.** An individual may “abandon” an expectation of privacy in an object by denying ownership of the object. See, e.g., United States v. Fulani, 368 F.3d 351, 354 (3rd Cir. 2004) (Where defendant “disclaim[ed] ownership of every bag located in the overhead rack, including the one that bore his name on it,” he had “abandoned ownership in his bag, effectively waiving his right to bar its search”); Burbage, 365 F.3d at 1178 (“By affirmatively denying to [the officer] that he owned the backpack, Defendant lost any objectively reasonable expectation of privacy in the backpack as a whole. To deny ownership is to announce to the world, ‘you want it, you can have it, as far as I’m concerned’”); United States v. Dillard, 78 Fed. Appx. 505, 510 (6th Cir. 2003) (unpublished) (“When a person has disclaimed ownership of a discarded item or container, courts have repeatedly held that the person has no legitimate expectation of privacy in the item or container and has thus abandoned it”); United States v. Caballero-Chavez, 260 F.3d 863, 867 (8th Cir. 2001) (“Given the defendants’ repeated disclaimers, the district court’s finding that they abandoned any interest in Room 222 and its contents is not clearly erroneous”); United States v. McDonald, 100 F.3d 1320, 1327 (7th Cir. 1996), cert. denied, 520 U.S. 1258 (1997) (Abandonment through disclaimer occurred when defendant “denied ownership both when [the officer] directly asked her whether she owned the suspect bags and collectively asked all the bus passengers if anyone owned the luggage in question”); United States v. Han, 74 F.3d 537, 543 (4th Cir.), cert. denied, 517 U.S. 1239 (1996) (“Denial of ownership ... constitutes abandonment”)(citation omitted).

NOTE: In these types of situations, abandonment is proper even where a law enforcement officer subjectively knows or believes that the suspect possessed or owned the property in question. See, e.g., Fulani, 368 F.3d at 355 (Where defendant “refuse[d] to claim luggage with his nametag on three separate occasions,” court determined “he no longer ha[d] a reasonable expectation of privacy in his luggage”); Han, 74 F.3d at 545 (“Whether the officers knew that Han owned the bag is irrelevant. The constitutional property right belonged to Han, and his abandonment of that right did not depend on whether the officers knew that it existed”) United States v. Ruiz, 935 F.2d 982, 984 (8th Cir. 1991)(Officers may reasonably believe that a suspect’s disclaimer of an interest in luggage is an abandonment of his privacy interest, even if they have other evidence of possession).

- b) **Abandonment May Occur Through the Discarding of an Object.** An individual may also “abandon” an expectation of privacy in an object by discarding it. See, e.g., United States v. Bradshaw, 102 F.3d 204, 213 (6th Cir. 1996), cert. denied, 520 U.S. 1178 (1997) (Defendant abandoned property when, “while fleeing, [he] discarded the pill bottles” containing crack cocaine); United States v. Segars, 31 F.3d 655, 658 (8th Cir. 1994), cert. denied, 513 U.S. 1099 (1995)(Abandonment occurred when defendant, “confronted by police officers ... dropped the package, backed away from the apartment door and attempted to flee”); United States v. Trimble, 986 F.2d 394, 398 (10th Cir.), cert. denied, 508 U.S. 965 (1993)(Abandonment occurred when the defendant “removed an amber vial from his pants pocket and attempted to drop it to the ground”).

- 2) **Abandonment May Not Be Caused By Police Misconduct.** An individual's abandonment of certain property may be found involuntary when it is preceded by unlawful police misconduct. *Cofield*, 272 F.3d at 1307. See also *McDonald*, 100 F.3d at 1328 ("An abandonment that results from police misconduct is not valid"); *United States v. Washington*, 146 F.3d 536, 537 (8th Cir. 1998), cert. denied, 531 U.S. 1015 (2000) ("The general principle is, 'if an illegal search taints a subsequent act of abandonment, evidence acquired after the abandonment ought to be suppressed as the fruit of the unlawful search'" (citation omitted); *Fulani*, 368 F.3d at 355 (Same).

NOTE: However, for the abandonment to be considered involuntary due to police misconduct, there must be a nexus between the misconduct and the abandonment. For example, where the abandonment was the direct result of an unlawful seizure, the abandonment may be found to be involuntary. See, e.g., *United States v. Lewis*, 921 F.2d 1294, 1302 (D.C. Cir. 1990) ("An abandonment may be involuntary, and thus invalid, where it results directly from police misconduct, such as an illegal search or seizure product of an unlawful seizure"). See also *United States v. Gilman*, 684 F.2d 616, 620 (9th Cir. 1982) ("There must be a nexus between the allegedly unlawful police conduct and abandonment of property if the challenged evidence is to be suppressed"); *United States v. Boone*, 62 F.3d 323, 326 (10th Cir.), cert. denied, 516 U.S. 1014 (1995) ("While it is true that a criminal defendant's voluntary abandonment of evidence can remove the taint of an illegal stop or arrest, it is equally true that for this to occur, the abandonment must be truly voluntary and not merely the product of police misconduct" (citation omitted); *United States v. Leshuk*, 65 F.3d 1105, 1111 (4th Cir. 1995) (Noting that, "although a person does not voluntarily abandon property when the abandonment results from police misconduct," suppression not required because investigative stop of defendant was lawful").

- h. **Garbage.** When analyzing the search and seizure of garbage, the location of the garbage at the time of the seizure is critical.

- 1) **There is an Expectation of Privacy in Garbage Inside the Home.** An individual would clearly have a reasonable expectation of privacy in garbage located inside their home. See United States v. Kramer, 711 F.2d 789, 793 (7th Cir.), cert. denied, 464 U.S. 962 (1983)("We do not doubt ... that had the police broken into the defendant's house and removed the records from a waste paper basket in defendant's bedroom, the records would not be admissible as evidence against him, even if all that was in the waste-paper basket was garbage"); United States v. Certain Real Property Located at 987 Fisher Road, 719 F. Supp. 1396, 1405 (E.D. Mich. 1989)("A reasonable expectation of privacy in garbage would be at its greatest level when the garbage is still being accumulated in the home"). However, when the garbage has been removed from the home, different issues arise regarding the warrantless search and seizure of garbage.
- 2) **There is No Expectation of Privacy in Garbage On the Curb of a Public Street.** "The warrantless search and seizure of the garbage bags left at the curb outside [a defendant's] house would violate the Fourth Amendment only if [the defendant] manifested a subjective expectation of privacy in their garbage that society accepts as objectively reasonable." California v. Greenwood, 486 U.S. 35, 39 (1988). When garbage is placed on the curb of a public street, it is "readily accessible to animals, children, scavengers, snoops, and other members of the public." *Id.* at 40 (citation omitted)(internal footnotes omitted). Further, placement of the garbage in this location is done for the specific purpose of giving it to a third party (i.e., the trash collector), who may himself choose to examine its contents. "Accordingly, having deposited their garbage 'in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it,' [an individual] could have had no reasonable expectation of privacy in the inculpatory items that they discarded." *Id.* at 40-41 (internal citation omitted).
- 3) **There May Be An Expectation of Privacy in Garbage Located Within the Curtilage of a Home.** When garbage is located outside a home, but still within the home's curtilage, a different issue than that addressed in Greenwood is presented.

- a) **There is No Bright-Line Rule That Garbage of Curtilage is Protected By the Fourth Amendment.** Initially, it should be noted that there is no "bright-line" rule that garbage located within the curtilage of a home is protected by the Fourth Amendment. See United States v. Shanks, 97 F.3d 977, 979 (7th Cir. 1996), cert. denied, 519 U.S. 1135 (1997)(In discussing issue of garbage located on curtilage, court noted, "mere intonation of curtilage does not end the inquiry"); United States v. Long, 176 F.3d 1304, 1308 (10th Cir.), cert. denied, 528 U.S. 921 (1999) ("Whether the officers violated the Fourth Amendment does not depend solely on curtilage. Defendant must still show that he had a reasonable expectation of privacy in the trash bags"). Instead, when analyzing these types of situations, courts typically look at the "public access" to the garbage to determine whether the warrantless search and seizure of garbage complies with the Fourth Amendment. See, e.g., United States v. Comeaux, 955 F.2d 586, 589 (8th Cir.), cert. denied, 506 U.S. 845 (1992)("We believe that the 'proper focus under Greenwood is whether the garbage was readily accessible to the public so as to render any expectation of privacy objectively unreasonable") (citation omitted).
- b) **Generally, a Person's Reasonable Expectation of Privacy Increases the Closer the Garbage is to the Home.** As a general rule, an individual's reasonable expectation of privacy "will increase as the garbage gets closer to the garage or house." United States v. Hedrick, 922 F.2d 396, 400 (7th Cir.), cert. denied, 502 U.S. 847 (1991). Thus, "garbage bags close to home – in a garage waiting to be set out by the curbside, within the curtilage, or in a back porch – can engender privacy expectations." Certain Real Property Located at 987 Fisher Road, 719 F. Supp. at 1404. See also Hedrick, 922 F.2d at 400 ("Garbage cans placed next to the house or the garage are not so accessible to the public that any privacy expectations are objectively unreasonable").

- c) **"Readily Accessible" Garbage May Not Be Protected, Even Though Within the Home's Curtilage.** Alternatively, "where ... the garbage is readily accessible from the street or other public thoroughfares, an expectation of privacy may be objectively unreasonable because of the common practice of scavengers, snoops, and other members of the public in sorting through garbage." Hedrick, 922 F.2d at 400. In such cases, the garbage may be seized without a warrant even though a technical trespass onto the curtilage has ensued. See, e.g., Kramer, 711 F.2d at 794 (Seizure of garbage permissible even though "it was necessary for the police to trespass a few feet upon the outer edge of his front yard either by reaching across the fence into the air space above the yard or by stepping across the fence onto the yard"); Hedrick, 922 F.2d at 400 (Court held garbage was "readily accessible to public" and seizure was permissible even though located on defendant's curtilage because "distance between the garbage cans and the public sidewalk was relatively short, the garbage was collected by the garbage service from that location, and the garbage cans were clearly visible from the sidewalk"); Shanks, 97 F.3d at 980 (Seizure of garbage from curtilage permissible where "garbage cans ... were readily accessible and visible from a public thoroughfare, the alley, and because it is common for scavengers to snoop through garbage cans found in such alleys"); Comeaux, 955 F.2d at 589 (Seizure of garbage from curtilage permissible where garbage "was readily accessible to the public"); Certain Real Property Located at 987 Fisher Road, 719 F. Supp. at 1404 (Seizure of garbage impermissible where garbage was located "against the back wall of the house, hidden from view of ordinary pedestrians passing by the front of the house").

- i. **Canine Sniffs.** The use of a canine to sniff a container, such as luggage, located in a public place, does not intrude upon a reasonable expectation of privacy and is not considered a “search” for purposes of the Fourth Amendment. See United States v. Place, 462 U.S. 696, 707 (1983); Illinois v. Caballes, ___ U.S. ___, 125 S. Ct. 834, 848 (2005)(“A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment”). While “a passenger has a reasonable expectation of privacy that the contents of his luggage will not be exposed absent consent or a search warrant,” the passenger’s reasonable expectation of privacy “does not extend to the airspace around the luggage.” United States v. Daniel, 982 F.2d 146, 150-151 (5th Cir. 1993)(internal citation and quote omitted). See also United States v. Gant, 112 F.3d 239, 241 (6th Cir. 1997)(Noting “a passenger on a common carrier has no reasonable expectation of privacy in the exterior of his luggage or the airspace surrounding it”).
- j. **Sensory Enhancements.** The lawfulness of using devices to enhance a law enforcement officer’s senses generally turns upon (1) the sophistication of the device, and (2) whether the activity that was viewed occurred in public or in private. See Kyllo v. United States, 533 U.S. 27, 34 (2001) (“We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area,’ constitutes a search - at least where (as here) the technology in question is not in general public use”)(internal citation omitted). Some specific examples of traditional devices are listed below.

- 1) **Binoculars and Telescopes.** As a general rule, the use of binoculars and telescopes to observe public conduct does not turn the surveillance into a search. See, e.g., United States v. Lace, 669 F.2d 46, 51 (2d Cir.), cert. denied, 459 U.S. 854 (1982); United States v. Allen, 633 F.2d 1282, 1290-91 (9th Cir. 1980); United States v. Minton, 488 F.2d 37, 38 (4th Cir. 1973), cert. denied, 416 U.S. 936 (1974). However, where the conduct being observed is taking place inside a person's residence, "the use of vision enhancing devices can taint an otherwise valid surveillance of the interior of a home when the devices allow the observer to view not only activities the homeowner should realize might be seen by unenhanced viewing but also the details of activities the homeowner legitimately expects will not be observed." United States v. Whaley, 779 F.2d 585, 591 (11th Cir. 1986), cert. denied, 479 U.S. 1055 (1987). See also United States v. Taborda, 635 F.2d 131, 138-139 (2d Cir. 1980) ("The vice of telescopic viewing into the interior of a home is that it risks observation not only of what the householder should realize might be seen by unenhanced viewing, but also of intimate details of a person's private life, which he legitimately expects will not be observed either by naked eye or enhanced vision").
- 2) **Flashlights and Searchlights.** The use of flashlights and searchlights for illumination does not constitute a search. See United States v. Lee, 274 U.S. 559, 563 (1927) (Searchlight); Texas v. Brown, 460 U.S. 730, 740 (1983) (In upholding use of flashlight, Court noted, "numerous other courts have agreed that the use of artificial means to illuminate a darkened area simply does not constitute a search, and thus triggers no Fourth Amendment protection").
- 3) **Thermal Imaging.** In Kyllo v. United States, 533 U.S. 27 (2001), the Supreme Court held that the use of thermal imaging to detect the heat emanating from a residence constituted a "search" under the Fourth Amendment. Because thermal imaging is a technology that is "not in general public use," to use this type of device to obtain information about the inside of a residence "that would previously have been unknowable without physical intrusion" without first obtaining a warrant violates the Fourth Amendment. *Id.* at 40, see also United States v. Huggins, 299 F.3d 1039, 1044 n.5 (9th Cir.), cert. denied, 537 U.S. 1079 (2002) ("the quantum of probable cause necessary to justify a thermal imaging search does not differ from that necessary to justify a physical search.")

- 4) **Aerial Surveillance.** The use of overflights to detect criminal activity is common in law enforcement. When conducting overflights, law enforcement officers may operate in navigable airspace to the same extent that a private person could. In such situations, "the Fourth Amendment ... does not require the police traveling in the public airways ... altitude to obtain a warrant in order to observe what is visible to the naked eye." California v. Ciraolo, 476 U.S. 207, 215 (1986). See also Florida v. Riley, 488 U.S. 445, 451 (1989)(Where observations were made by helicopter, viewing was lawful, in that "any member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse").
- a) **Title 49 U.S.C. § 40103.** Section 40103 of Title 49 recognizes that "a citizen of the United States has a public right of transit through the navigable airspace."
- b) **14 C.F.R. 91.119.** Section 91.119 provides the minimum safe altitudes for operation of aircraft, including helicopters. These regulations define where the public may operate in airspace, which further define where a law enforcement officer may go during an overflight.
- (1) **Fixed-Wing Aircraft (Congested Areas).** Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of **1,000 feet** above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.
- (2) **Fixed-Wing Aircraft (Uncongested Areas).** An altitude of **500 feet** above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.
- (3) **Helicopters.** Helicopters may be operated at less than the minimums prescribed above for fixed-wing aircraft, if the operation is conducted without hazard to persons or property on the surface.

- k. **Mail.** “It has long been held that first-class mail such as letters and sealed packages subject to letter postage – as distinguished from newspapers, magazines, pamphlets, and other printed matter - is free from inspection by postal authorities, except in the manner provided by the Fourth Amendment.” United States v. Van Leeuwen, 397 U.S. 249, 251 (1970). *See also Jacobsen*, 466 U.S. at 114 (“Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such effects are presumptively unreasonable”); United States v. Ganser, 315 F.3d 839, 842-43 (7th Cir. 2003)(“Individuals have a Fourth Amendment right to be free from unreasonable searches and seizures of items they place in the mail”)(citations omitted).

- 1) **First-Class Mail.** First-class mail is protected by Title 39 U.S.C. § 3623(d), which provides:

The Postal Service shall maintain one or more classes of mail for the transmission of letters sealed against inspection. The rate for each such class shall be uniform throughout the United States, its territories, and possessions. One such class shall provide for the most expeditious handling and transportation afforded mail matter by the Postal Service. **No letter of such a class of domestic origin shall be opened except under authority of a search warrant authorized by law, or by an officer or employee of the Postal Service for the sole purpose of determining an address at which the letter can be delivered, or pursuant to the authorization of the addressee.**

- 2) **First-Class Mail – Defined.** First-Class Mail includes all personal correspondence, all bills and statements of accounts, all matter sealed or otherwise closed against inspection, and matter wholly or partly in writing or typewriting.
- 3) **Mail Other Than First-Class.** In cases involving mail other than first-class mail, a law enforcement officer seeking to search the contents must comply with Postal Regulations.
- 4) **Detention of Mail.** Like the detention of any other “container,” mail may be detained only upon a showing of reasonable suspicion. *See Van Leeuwen*, 397 U.S. at 252-253. *See also Ganser*, 315 F.3d at 843 (holding that “upon reasonable suspicion that the package contains contraband, law enforcement authorities may detain the package for a reasonable length of time while investigating the package”) (citation omitted).

- 5) **No Expectation of Privacy in the Outside of Mail.** “There is no reasonable expectation of privacy with regard to the outside of a letter.” United States v. DePoli, 628 F.2d 779, 786 (2d Cir. 1980)[*citing* United States v. Leonard, 524 F.2d 1076, 1087 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976)]. See also United States v. Hinton, 222 F.3d 664, 675 (9th Cir.), *cert. denied*, 529 U.S. 1056 (2000)(“There is no expectation of privacy in the addresses on a package, regardless of its class”); United States v. Huie, 593 F.2d 14, 15 (5th Cir. 1979); United States v. Choate, 576 F.2d 165, 182 (9th Cir.), *cert. denied*, 439 U.S. 953 (1978)].
- 6) **Mail “Covers” or “Watches.”** “Title 39, Section 233.3 of the Code of Federal Regulations, regulates the use of ‘mail covers.’” Hinton, 222 F.3d at 674. In sum, a mail “cover” or “watch” simply “entails asking the post office to specifically watch for a particular address and, if anything comes in for that address, to pull it out of the mail stream and notify the postal inspectors. The postal inspectors then decide whether to pursue anything further or simply return it to the mail stream.” United States v. Glover, 104 F.3d 1570, 1575 n.1 (10th Cir. 1997). This type of investigative tool has repeatedly been found valid under the Fourth Amendment, so long as the mail isn’t detained for an unreasonable amount of time. See, e.g., Lustiger v. United States, 386 F.2d 132, 139 (9th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968)(“The Fourth Amendment does not preclude postal inspectors from copying information contained on the outside of sealed envelopes in the mail, where no substantial delay in the delivery of the mail is involved”).

NOTE: Where a law enforcement officer violates the postal regulations regarding “mail covers,” it will typically not result in suppression of any evidence that is obtained as a result of the violation. As one court has noted: “Suppression is not the appropriate remedy for a failure to follow agency regulations.” Hinton, 222 F.3d at 674.

C. EPO #3: IDENTIFY APPROPRIATE ACTIONS THAT MAY BE TAKEN WHEN REASONABLE SUSPICION EXISTS

1. **General Rule - “Unreasonable Seizures” Are Forbidden.** As noted previously, “the Fourth Amendment forbids searches and seizures that are unreasonable.” Terry v. Ohio, 392 U.S. 1, 9 (1968). Of course, not all personal interactions between law enforcement officers and citizens involve “seizures” of persons under the Fourth Amendment. Florida v. Bostick, 501 U.S. 429, 434 (1991)(citation omitted). For example, some encounters are purely consensual. In these situations, “the encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature.” Id. See *also* Brower v. County of Inyo, 489 U.S. 593, 596 (1989) and Terry, 392 U.S. at 19 n.16. For that reason, it is important for a law enforcement officer to understand exactly when an individual is “seized” for purposes of the Fourth Amendment.
2. **When is a Person “Seized” Under the Fourth Amendment?** Generally speaking, a person is seized under the Fourth Amendment when, based on the totality of the circumstances, a reasonable person would not feel free to leave or otherwise terminate the encounter based upon a law enforcement officer’s application of physical force (however slight) or show of authority. California v. Hodari, 499 U.S. 621 (1991); Brower v. County of Inyo, 489 U.S. 593 (1989); Michigan v. Chesternut, 486 U.S. 567 (1988); and Florida v. Bostick, 501 U.S. 429 (1991); United States v. Brown, 410 F.3d 588, 594 (4th Cir. 2005)(“We are mindful of the general rule that a seizure ‘requires either physical force ... or, where that is absent, submission to the assertion of authority’”(citation omitted); United States v. Spence, 397 F.3d 1280, 1283 (10th Cir. 2005) (“A seizure occurs only when an officer, by means of physical force or show of authority, in some way restrains the liberty of a citizen”).

NOTE: “The Supreme Court has formulated two approaches for determining whether a person has been ‘seized’ within the meaning of the Fourth Amendment.” United States v. Jerez, 108 F.3d 684, 689 (7th Cir. 1997). “The first of these approaches is employed when the police approach an individual in a place such as an airport, train terminal or on the street,” *id.*, and is discussed above. “The second approach articulated by the Supreme Court applies when the police approach an individual in a confined space such as a bus.” *Id.* The Supreme Court has repeatedly discussed the seizure of persons in the context of encounters that occur on buses. See, e.g., Bostick, *supra*. In these situations, “the traditional rule, which states that a seizure does not occur so long as a reasonable person would feel free ‘to disregard the police and go about his business,’ is not an accurate measure of the coercive effect of a bus encounter. A passenger may not want to get off a bus if there is a risk it will depart before the opportunity to reboard. A bus rider’s movements are confined in this sense, but this is the natural result of choosing to take the bus; it says nothing about whether the police conduct is coercive.” United States v. Drayton, 536 U.S. 194, 201-02 (2002) (citation omitted). Instead, in a “bus encounter” type situation, “[t]he proper inquiry ‘is whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.’” *Id.* at 202 (citation omitted). At least one court has extended this rule to cover contacts that occur between police officers and motel occupants. See Jerez, 108 F.3d at 689-90.

3. **When is Property “Seized” Under the Fourth Amendment?** Alternatively, “a ‘seizure’ of property occurs when there is some meaningful interference with an individual’s possessory interests in that property.” Jacobsen, 466 U.S. at 113 (footnote omitted).

NOTE: When law enforcement officers move a person's property, a question arises as to how far they can go before a "seizure" of the property occurs. United States v. Gomez, 312 F.3d 920, 923-24 (8th Cir. 2002) (finding "minimal interference with Gomez's possessory interest" and holding no seizure occurred when a drug interdiction officer at a U.S. Postal Service facility moved a package to a command center twenty yards from a conveyor belt in a sorting area); United States v. Harvey, 961 F.2d 1361, 1363-64 (8th Cir. 1992) (holding no seizure occurred when police removed luggage from a bus's overhead luggage compartment to the aisle below to subject the luggage to a drug-sniffing dog). "[C]ourts must focus on three factors when considering whether law enforcement's interference with checked luggage constitutes a seizure. First, did law enforcement's detention of the checked luggage delay a passenger's travel or significantly impact the passenger's freedom of movement? Second, did law enforcement's detention of the checked luggage delay its timely delivery? Third, did law enforcement's detention of the checked luggage deprive the carrier of its custody of the checked luggage? If none of these factors is satisfied, then no Fourth Amendment seizure has occurred. Conversely, if even a single factor is satisfied, then a Fourth Amendment seizure has occurred." United States v. Va Lerie, 424 F.3d 694, 707 (8th Cir. 2005). "We conclude the NSP's removal of Va Lerie's checked luggage from the bus to a room inside the terminal to seek consent to search did not constitute a meaningful interference with Va Lerie's possessory interests in his luggage. Therefore, no Fourth Amendment seizure occurred." Id. at 708.

4. **There are Three Basic Types of Police-Citizen Encounters.** The Supreme Court has recognized three distinct types of police-citizen encounters. United States v. Weaver, 282 F.3d 302, 309 (4th Cir.), cert. denied, 537 U.S. 847 (2002).

- a. **One Type of Encounter is a Voluntary Contact.** These are brief, voluntary encounters between law enforcement officers and citizens that require neither probable cause nor reasonable suspicion. See Florida v. Bostick, 501 U.S. 429, 434 (1991). A voluntary contact **IS NOT** considered a seizure for purposes of the Fourth Amendment. See, e.g., United States v. Esparza-Mendoza, 386 F.3d 953, 957 (10th Cir. 2004)(Noting “the Fourth Amendment proscribes unreasonable searches and seizures; it does not proscribe voluntary cooperation”); United States v. Moore, 375 F.3d 580, 584 (7th Cir. 2004)(“[I]t is well settled that a consensual encounter between an individual and a law enforcement official does not trigger Fourth Amendment scrutiny”).
- b. **A Second Type of Encounter is an Investigative Detention.** “Generally, ‘the Fourth Amendment ... prohibits state actors from making searches or seizures in the absence of probable cause.’” United States v. Heard, 367 F.3d 1275, 1278 (11th Cir. 2004)[citing United States v. Dunn, 345 F.3d 1285, 1288 (11th Cir. 2003)]. However, the Supreme Court has “announced an exception to the probable cause requirement: minimally intrusive searches and seizures of the person are permissible when a law enforcement officer has an objectively **reasonable suspicion** that ‘criminal activity may be afoot.’” *Id.* at 1289 (emphasis added). Sometimes referred to as “**Terry Stops**,” these are brief investigatory stops that must be supported by reasonable, articulable suspicion. Terry v. Ohio, 392 U.S. 1 (1968). An investigative detention is considered a seizure for purposes of the Fourth Amendment, although it does not rise to the level of an arrest. See, e.g., United States v. Acosta, 363 F.3d 1141, 1145-46 (11th Cir. 2004)(“There is a difference between an investigative stop of limited duration for which reasonable suspicion is enough, and a detention that amounts to an arrest for which probable cause is required”); United States v. Bentley, 29 F.3d 1073, 1075 (6th Cir.), *cert. denied*, 513 U.S. 1028 (1994)(Noting that, “where a law enforcement officer lacks probable cause, but possesses a reasonable and articulable suspicion that a person has been involved in criminal activity, he may detain the suspect briefly to investigate the suspicious circumstances”).
- c. **A Third Type of Encounter is an Arrest.** An individual may be arrested upon a law enforcement officer establishing probable cause that a crime has been committed. Brown v. Illinois, 422 U.S. 590 (1975). An arrest is considered a seizure for purposes of the Fourth Amendment.

See also United States v. Johnson, 384 F.3d 1185, 1188 (10th Cir. 2004)(Noting that “police-citizen encounters come in three varieties. The first involves the voluntary cooperation of a citizen in response to non-coercive questioning. The second is a Terry v. Ohio stop, involving only a brief, non-intrusive detention and frisk for weapons when officers have a reasonable suspicion that the defendant has committed a crime or is about to do so. The third encounter is the arrest of the defendant”)(citation omitted).

5. **Seizures That Begin Lawfully May Turn Unlawful.** “[A] seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution.” Caballes, 125 S. Ct. at 837. So, for example, a “seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.” Id.
6. **Voluntary Contacts.** In Florida v. Royer, 460 U.S. 491, 497 (1983)(plurality opinion), the Supreme Court noted, “law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.” These types of encounters are typically referred to as “voluntary contacts” or “consensual encounters.” See, e.g., Esparza-Mendoza, 386 F.3d at 957 (“An encounter is consensual if the defendant is free to leave at any time during the encounter”); United States v. Manjarrez, 348 F.3d 881, 885-86 (10th Cir. 2003)(“An encounter is consensual when a reasonable person would believe he was free to leave or disregard the officer’s request for information. ... A consensual encounter is a voluntary exchange between the officer and the citizen in which the officer may ask non-coercive questions”)[citing United States v. West, 219 F.3d 1171, 1176 (10th Cir. 2000)].
 - a. **No Suspicion is Required for a Voluntary Contact.** As noted above, voluntary contacts require neither probable cause nor reasonable suspicion.
 - b. **Permissible Actions During a Voluntary Contact.** When conducting a voluntary contact, a law enforcement officer may take the following actions without turning the contact into a “seizure” implicating the Fourth Amendment:
 - 1) **Questioning.** A law enforcement officer may approach an individual and ask him or her questions, even incriminating questions, without turning the contact into a seizure. See Texas v. Cobb, 532 U.S. 162, 171-72 (2001)(Noting “it is critical to recognize that the Constitution does not negate society’s interest in the ability of police to talk to witnesses and suspects ...”); Florida v. Rodriguez, 469 U.S. 1, 5-6 (1984); INS v. Delgado, 466 U.S. 210, 216 (1984).

- 2) **Identification.** A law enforcement officer may request, but not demand, to see an individual's identification without turning the contact into a seizure. See Delgado, supra; Royer, supra; United States v. Campbell, 486 F.3d 949 (6th Cir. 2007) (reaffirming that interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure); United States v. Mendenhall, 446 U.S. 544, 557-558 (1980); United States v. Wade, 400 F.3d 1019, 1022 (7th Cir. 2005) (noting that "requests for identification do not imply a detention").
- 3) **Display of Authority.** A law enforcement officer may identify himself and display his credentials during a voluntary contact. See United States v. Polk, 97 F.3d 1096, 1098 (8th Cir. 1996); United States v. Moreno, 897 F.2d 26, 30-31 (2d Cir.), cert. denied, 497 U.S. 1009 (1990).
- 4) **Request for Consent to Search.** A law enforcement officer may seek consent for a search without turning the contact into a seizure. See Royer, supra; Bostick, supra; United States v. Glass, 128 F.3d 1398, 1407 (10th Cir. 1997); United States v. Peterson, 100 F.3d 7, 11 (2d Cir. 1996).

NOTE: Occasionally, students will suggest that any time an officer asks a person for consent to search, the person may feel intimidated to the extent that he does not feel “free to leave.” One court that addressed that contention did so as follows: “Even though consensual searches, and stops that fall short of seizures, do not implicate the Fourth Amendment, we recognize that there is a bit of intimidation involved anytime a police officer stops a person and asks for permission to conduct a search. The person to whom the request is directed might consider several possibilities. If he refuses, he may think the police will assume he’s got something to hide and not allow him to leave. Although the former is probably true, he should know, assuming he didn’t sleep through high school civics classes, that the latter proposition is not true. If he consents to the search, it might be because he has nothing to hide, or because he thinks a search will not find what he is concealing. Regardless of the thought processes someone who is asked to consent to a search might go through, we look to objective factors - whether a reasonable person would feel free to terminate the encounter.” Wade, 400 F.3d at 1021-22 (internal citation omitted).

For more discussions of permissible actions during a voluntary encounter, see generally United States v. Bryson, 110 F.3d 575, 579-80 (8th Cir. 1997); United States v. Odum, 72 F.3d 1279, 1283 (7th Cir. 1995); United States v. Travis, 62 F.3d 170, 173 (6th Cir. 1995), cert. denied, 516 U.S. 1060 (1996).

- c. **When Voluntary Contacts Become Investigative Stops.** While voluntary contacts may be made without any basis for suspecting an individual of wrongdoing, it should be remembered that “some contacts that start out as constitutional may ... at some unspecified point, cross the line and become an unconstitutional seizure.” Weaver, 282 F.3d at 309. See also United States v. Foster, 376 F.3d 577, 584 (6th Cir. 2004)(“A consensual encounter can ripen into a seizure if in light of all of the circumstances, a reasonable person would have believed that he or she was not free to walk away”)(citation and internal quotation marks and brackets omitted). For this reason, a law enforcement officer’s actions during a voluntary contact may be scrutinized to determine whether the encounter “somehow crossed the not-so-bright line and blossomed into an unconstitutional seizure.” Id. “No single factor will be dispositive in every case.” Esparza-Mendoza, 386 F.3d at 959 (citation omitted). Among the factors courts will examine to determine whether a seizure has occurred are the following:

- 1) **Time, Place, and Purpose of the Encounter;** United States v. Washington, 387 F.3d 1060, 1068 (9th Cir. 2004)(Factors to consider included “whether the encounter occurred in a public or non-public setting”); United States v. Abdenbi, 361 F.3d 1281, 1291 (10th Cir. 2004)(Noting relevant factors to consider in whether consensual encounter became seizure include whether the “interaction” occurred “in a nonpublic or a small, enclosed space” in the “absence of other members of the public”)[*citing* United States v. Sanchez, 89 F.3d 715, 718 (10th Cir. 1996)]; United States v. Williams, 356 F.3d 1268, 1274 (10th Cir. 2004)(No seizure where “the encounter occurred in a relatively open space” and the defendant’s “path of egress ... was at no time impeded”); United States v. Jefferson, 906 F.2d 346, 349 (8th Cir. 1990)(Noting that “courts have considered the time and setting of the encounter to be important factors in determining whether a seizure has occurred”); United States v. Battista, 876 F.2d 201, 204 (D.C. Cir. 1989)(Among facts considered in deciding that seizure occurred were that defendant was “roused ... from his bed at 6:30 a.m. ... in some partial state of undress”).
- 2) **Words Used By the Officer,** Williams, 356 F.3d at 1274 (Noting “a consensual encounter between a citizen and police can be transformed into a seizure through persistent and accusatory questioning by police”); United States v. Richardson, 385 F.3d 625, 629 (6th Cir. 2004)(“In determining whether a particular encounter between an officer and a citizen constitutes a seizure, we recognize that words alone may be enough to make a reasonable person feel that he would not be free to leave”).

- 3) **The Use of Language or Tone of Voice Indicating That Compliance With the Officer's Request Might Be Compelled**, United States v. Drayton, 536 U.S. 194, 204 (2002)(Where officer spoke to bus passengers "one by one and in a polite, quiet voice," without any commands or threats, no seizure occurred because nothing the officer said "would suggest to a reasonable person that he or she was barred from leaving the bus or otherwise terminating the encounter"); Washington, 387 F.3d at 1068 (Factors to consider included "whether the officer's officious or authoritative manner would imply that compliance would be compelled"); Abdenbi, 361 F.3d at 1291 (Relevant factors in determining seizure included the "use of aggressive language or tone of voice indicating that compliance with an officer's request is compulsory") (citation omitted); United States v. Santos-Garcia, 313 F.3d 1073, 1078 (8th Cir. 2002)(No seizure occurred where, *inter alia*, "the tone of the entire exchange was cooperative"); United States v. Guerrero, 472 F.3d 784, 789 (10th Cir. 2007) (listing a "commanding tone of voice indicating that compliance might be compelled" as evidence of a coercive show of authority);.
- 4) **Threatening Presence of Several Officers**, Drayton, 536 U.S. at 204 (Where there was "no overwhelming show of force," no seizure occurred); Abdenbi, 361 F.3d at 1291 (Relevant factors in determining seizure included "the threatening presence of several officers")(citation omitted); Washington, 387 F.3d at 1068 (Factors to consider included "the number of officers" present); Guerrero, 472 F.3d at 789 (same).
- 5) **Display of Weapons**, Drayton, 536 U.S. at 204 (No seizure occurred where, *inter alia*, there was "no brandishing of weapons" by the officers); Washington, 387 F.3d at 1068 (Factors in determining whether seizure occurred included whether weapons were displayed); Williams, 356 F.3d at 1274 (No seizure where "[n]one of the officers were uniformed, nor did they at any time display a weapon"); Santos-Garcia, 313 F.3d at 1078 (No seizure occurred where, *inter alia*, the officer "did not display a weapon").
- 6) **Physical Touching of the Citizen**, Drayton, 536 U.S. at 204 (No seizure occurred where, *inter alia*, "[t]here was no application of force"); Abdenbi, 361 F.3d at 1291 (Relevant factors in determining seizure included "some physical touching by an officer") (citation omitted); Guerrero, 472 F.3d at 789 (same).

- 7) **Retention of a Citizen's Identification or Other Personal Property**, Abdenbi, 361 F.3d at 1291 (Relevant factors in determining seizure included the "prolonged retention of a person's personal effects") (citation omitted); Weaver, 282 F.3d at 310 ("Most important, for our present purposes, numerous courts have noted that the retention of a citizen's identification or other personal property or effects is highly material under the totality of the circumstances analysis"); Santos-Garcia, 313 F.3d at 1078 (Noting defendant was "no longer seized within the meaning of the Fourth Amendment after [the officer] returned [his] identification and issued a warning ticket").
- 8) **Requests to Accompany the Officer to the Police Station**, Abdenbi, 361 F.3d at 1291 (Relevant factors in determining seizure included "a request to accompany the officer to the station")(citation omitted).
- 9) **Whether the Individual Was Advised He Was Not Required to Cooperate**, Washington, 387 F.3d at 1068 (Factors to consider included "whether the officers advised the detainee of his right to terminate the encounter"); United States v. Little, 18 F.3d 1499, 1505 (10th Cir. 1994)(en banc).
- See also* Mendenhall, 446 U.S. at 554; Bostick, 501 U.S. at 437; Chesternut, 486 U.S. at 571-76; Kaupp v. Texas, 538 U.S. 626 (2003); Wade, 400 F.3d at 1021-1023; Spence, 397 F.3d at 1283.

NOTE: Within the context of a traffic stop, many circuits have established a “bright-line” rule regarding seizures and the detention of a person’s driver’s license. More specifically, “[i]n the context of a traffic stop, if an officer retains one’s driver’s license, the citizen would have to choose between the Scylla of consent to the encounter or the Charybdis of driving away and risk being cited for driving without a license.” Weaver, 282 F.3d at 311. See, e.g., United States v. Mendez, 118 F.3d 1426, 1430 (10th Cir. 1997)(Noting that the Tenth Circuit Court of Appeals “has consistently applied at least one bright-line rule: an officer must return a driver’s documentation before the detention can end”); United States v. Chan-Jimenez, 125 F.3d 1324, 1326 (9th Cir. 1997)(“When a law enforcement official retains control of a person’s identification papers, such as vehicle registration documents or a driver’s license, longer than necessary to ascertain that everything is in order, and initiates further inquiry while holding on to the needed papers, a reasonable person would not feel free to depart”); United States v. Winfrey, 915 F.2d 212, 216 (6th Cir. 1990), cert. denied, 498 U.S. 1039 (1991)(“We find that a reasonable person would conclude that Winfrey was seized for purposes of the fourth amendment when his driver’s license, automobile registration, and keys were retained by the officers and he was ordered to remain there until the DEA agents arrived.”).

7. **Investigative Detentions.** Prior to 1968, encounters between law enforcement officers and citizens were categorized either as voluntary contacts (with no suspicion necessary) or arrests (which required probable cause). In Terry v. Ohio, 392 U.S. 1 (1968), the Supreme Court established the requisite standard for a third type of police-citizen encounter, known as an investigative detention (“Terry Stop”).
 - a. **Investigative Detentions Defined.** An “investigative detention” is a “brief, investigatory stop when a law enforcement officer has a reasonable, articulable suspicion that criminal activity is afoot.” Terry, 392 U.S. at 30; Illinois v. Wardlow, 528 U.S. 119, 123 (2000).
 - b. **Requirements for an Investigative Detention of a Person.** To conduct an investigative detention of a person, a law enforcement officer must meet two (2) requirements.

- 1) **Reasonable Suspicion is Required for an Investigative Stop.** First, a law enforcement officer must have “reasonable suspicion” to conduct an investigative detention. An officer need not know with absolute certainty that a crime is in progress or being considered. See Wardlow, 528 U.S. at 126 (“In allowing [investigatory] detentions, Terry accepts the risk that officers may stop innocent people”).
 - a) **“Reasonable Suspicion” is a Lesser Standard Than “Probable Cause”.** This standard is “considerably less than proof of wrongdoing by a preponderance of the evidence,” United States v. Sokolow, 490 U.S. 1, 7 (1989), and “is obviously less demanding than that for probable cause.” United States v. Montoya de Hernandez, 473 U.S. 531, 541, 544 (1985). Nevertheless, the Fourth Amendment requires “some minimal level of objective justification.” Sokolow, 490 U.S. at 7. Thus, a law enforcement officer “must be able to articulate something more than an inchoate and unparticularized suspicion or ‘hunch.’” Terry, 392 U.S. at 27. Stated differently, “[w]hat Terry requires to satisfy the Fourth Amendment’s reasonable seizure standard is ... a rational reason (as opposed to a hunch) to suspect criminal activity.” Bolton v. Taylor, 367 F.3d 5, 7 (1st Cir. 2004). Of course, “reasonable suspicion is not a ‘finely-tuned’ or bright-line standard; each case involving a determination of reasonable suspicion must be decided on its own facts.” Ornelas v. United States, 517 U.S. 690, 696 (1996).
 - b) **Courts Look at the “Totality of the Circumstances” to Determine if Reasonable Suspicion Exists.** “A court inquiring into the validity of a Terry stop must use a wide lens and survey the totality of the circumstances.” United States v. Romain, 393 F.3d 63, 71 (1st Cir. 2004). That’s because, typically, “[a] determination of reasonable suspicion ... does not depend on any single factor” United States v. Singh, 363 F.3d 347, 354 (4th Cir. 2004). Instead, to determine whether reasonable suspicion exists, courts “must look at the ‘totality of the circumstances’ of each case to see whether the detaining officer has a ‘particularized and objective basis’ for suspecting legal wrongdoing.” United States v. Arvizu, 534 U.S. 266, 273 (2002)(citation omitted). See also Sokolow, 490 U.S. at 8; United States v. Knox, 839 F.2d 283, 290 (6th Cir. 1988), cert. denied, 490 U.S. 1019 (1989) (Noting that, in order to conduct an investigation detention, “a pattern of suspicious behavior need only be recognizable by one ‘versed in the field of law enforcement’”).

NOTE: By utilizing a “totality of the circumstances” standard, law enforcement officers are allowed to “draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that ‘might well elude an untrained person.’” Arvizu, 534 U.S. at 273. *See also* Bolton, 367 F.3d at 9 (Noting that “the law imputes to a trained policeman a measure of expertise, and an explainable suspicion can be based on an assemblage of clues viewed through the lens of the policeman’s training and experience”)(internal citation omitted); United States v. Perkins, 363 F.3d 317, 321 (4th Cir. 2004)(Noting a “determination of reasonable suspicion must give due weight to common sense judgments reached by officers in light of their experience and training”). Of course, the Fourth Amendment still “requires police ‘to explain *why* the officer’s knowledge of particular criminal practices gives special significance to the apparently innocent facts observed.” United States v. Logan, 362 F.3d 530, 533 (8th Cir. 2004)(emphasis in original)[*citing* United States v. Johnson, 171 F.3d 601, 604 (8th Cir. 1999)].

- c) **Reasonable Suspicion Can Be Based Upon Completely Innocent Behavior.** “A reasonable suspicion of criminal activity may be formed by observing exclusively legal activity.” United States v. Gordon, 231 F.3d 750, 754 (11th Cir. 2000), *cert. denied*, 531 U.S. 1200 (2001). *See also* Wardlow, 528 U.S. at 125; Terry, 392 U.S. at 22-23. “[T]he relevant inquiry is not whether particular conduct is ‘innocent’ or ‘guilty,’ but the degree of suspicion that attaches to particular types of noncriminal acts.” Sokolow, 490 U.S. at 10. Nevertheless, “conduct typical of a broad category of innocent people provides a weak basis for suspicion.” United States v. Weaver, 966 F.2d 391, 394 (8th Cir.), *cert. denied*, 506 U.S. 1040 (1992).

- 2) **Generally, Criminal Activity Must Be Afoot to Justify an Investigative Detention.** Second, a law enforcement officer must reasonably suspect that “criminal activity is afoot.” In its most basic sense, this means that the officer must reasonably suspect that (1) a crime is about to be committed, Terry, supra; (2) a crime is being committed, Adams v. Williams, 407 U.S. 143 (1972); or (3) a crime has been committed, United States v. Hensley, 469 U.S. 221 (1985). It should be remembered, however, that “[o]fficers are not required under Terry to have reasonable suspicion of ongoing illegal activity in order to make investigative stops. Indeed, the very point of Terry was to permit officers to take preventive action and conduct investigative stops before crimes are committed, based on what they view as suspicious - albeit even legal - activity.” Perkins, 363 F.3d at 326.

NOTE: The Sixth Circuit categorically prohibits Terry stops based upon completed misdemeanors. Gaddis v. Redford Twp., 364 F.3d 763, 771, n.6 (6th Cir. 2004) (“Police may . . . make a stop when they have reasonable suspicion of a completed felony, though not of a mere completed misdemeanor.”) The Eighth, Ninth, and Tenth Circuits, which are the only other circuits to have ruled on the issue, hold that the reasonableness of a Terry stop for a completed misdemeanor depends upon the nature of the misdemeanor offense, with particular attention to the potential for ongoing or repeated danger (e.g., drunken and/or reckless driving), and any risk of escalation (e.g., disorderly conduct, assault, domestic violence). . . A Terry stop based on a completed misdemeanor is unreasonable when, within the totality of the circumstances, there is no public safety risk, and when alternative means to identify the suspect or achieve the investigative purpose of the stop are possible. United States v. Grigg, 498 F.3d 1070, 1081-82 (9th Cir. 2007); United States v. Hughes, 2008 U.S. App. LEXIS 4011 (8th Cir. 2008); United States v. Moran, 503 F.3d 1135 (10th Cir. 2007).

- c. **When Investigation Detentions Become Arrests.** While an investigative detention requires reasonable suspicion that criminal activity is afoot, an arrest requires probable cause that a crime is being, or has been, committed. The requirements for a valid arrest will be discussed more fully in other EPOs. However, it should be remembered that “an encounter that began as a permissible Terry stop may ... ripen[] into an arrest, which must be supported by probable cause” United States v. Perea, 986 F.2d 633, 644 (2d Cir. 1993). “No mechanical checklist has been assembled to facilitate distinguishing between such investigative stops, on the one hand, and those detentions, on the other, which though not technical, formal arrests are the ‘equivalent of an arrest’ and therefore require probable cause.” United States v. Quinn, 815 F.2d 153, 156 (1st Cir. 1987). See also United States v. Sharpe, 470 U.S. 675, 685 (1985)(Noting the difficulties in “distinguishing an investigative stop from a *de facto* arrest”)(emphasis in original); United States v. Acosta-Colon, 157 F.3d 9, 14 (1st Cir. 1998)(“There is no ‘litmus-paper test,’ ... to determine whether any particular mode of detention amounted to a *de facto* arrest”); Washington v. Lambert, 98 F.3d 1181, 1185 (9th Cir. 1996)(“There is no bright-line rule to determine when an investigatory stop becomes an arrest”). However, where “the totality of circumstances indicates that an encounter has become too intrusive to be classified as an investigative detention, the encounter is a full-scale arrest, and the government must establish that the arrest is supported by probable cause.” United States v. Hastamorir, 881 F.2d 1551, 1556 (11th Cir. 1989). In determining whether a *de facto* arrest occurred, courts will consider the following factors:

- 1) **The Purposes Behind the Stop/Nature of the Crime**, United States v. Seelye, 815 F.2d 48, 50 (8th Cir. 1987); United States v. McCarthy, 77 F.3d 522, 530 (1st Cir.), cert. denied, 519 U.S. 991 (1996) (citation omitted); United States v. Virden, 488 F.3d 1317, 1321 (11th Cir. 2007);
- 2) **Whether the Police Diligently Sought to Carry Out the Purpose of the Stop**, Sharpe, 470 U.S. at 686; McCarthy, 77 F.3d at 530 (citation omitted); United States v. Carter, 139 F.3d 424, 433 (4th Cir. 1998); Virden, 488 at 1321;
- 3) **The Amount of Force Used By the Police**, Perea, 986 F.2d at 645; McCarthy, 77 F.3d at 530;
- 4) **The Need for Such Force**, Perea, 986 F.2d at 645;
- 5) **Information Conveyed to the Detainee Concerning the Reasons For the Stop**, McCarthy, 77 F.3d at 530; Carter, 139 F.3d at 433 (Factors to consider included “whether the authorities made it absolutely clear that they planned to reunite the suspect and his possessions at some future time, and how they planned to do it”);

- 6) **The Extent to Which an Individual's Freedom of Movement was Restrained**, Perea, 986 F.2d at 645; Quinn, 815 F.2d at 157 n.2 (Noting that, "[w]hile restrictions on the freedom of movement is a factor to be taken into account in determining whether a person is under arrest, it alone is not sufficient to transform a Terry stop into a *de facto* arrest") (emphasis in original); McCarthy, 77 F.3d at 530 (Factors to consider in determining whether *de facto* arrest made include "the restrictions placed on his or her personal movement");
- 7) **The Number of Agents/Officers and Police Cars Involved**, Perea, 986 F.2d at 645; Seelye, 815 F.2d at 50;
- 8) **Whether the Target of the Stop Was Suspected of Being Armed**, Perea, 986 F.2d at 645; Seelye, 815 F.2d at 50;
- 9) **The Duration and Intensity of the Stop**, Perea, 986 F.2d at 645; Carter, 139 F.3d at 433; Virden, 488 at 1321;
- 10) **Whether the Stop Was Unnecessarily Prolonged**, Carter, 139 F.3d at 433;
- 11) **The Physical Treatment of the Suspect, Including Whether or Not Handcuffs Were Used**, Perea, 986 F.2d at 645;
- 12) **Any Alternative Means By Which the Police Could Have Served the Purpose of the Stop**, Seelye, 815 F.2d at 50 (Noting one factor to consider in whether stop rose to an arrest was "whether there was an opportunity for the officer to have made the stop in less threatening circumstances");
- 13) **The Time and Location of the Stop**, United States v. Jones, 759 F.2d 633, 640 (8th Cir.), cert. denied, 474 U.S. 837 (1985);
- 14) **The Strength of the Officer's Articulable, Objective Suspicions**, Seelye, 815 F.2d at 50;
- 15) **The Need for Immediate Action By the Officer**, Seelye, 815 F.2d at 50;
- 16) **The Presence or Lack of Suspicious Behavior or Movement By the Person Under Observation**, Seelye, 815 F.2d at 50;
- 17) **The Importance of the Governmental Interest Alleged to Justify the Intrusion**, Carter, 139 F.3d at 433.

- d. **Personal Property May Be Detained on Reasonable Suspicion.** Where a law enforcement officer has reasonable suspicion that a piece of personal property, such as luggage, contains contraband or evidence of a crime, the property may be detained. See United States v. Place, 462 U.S. 696, 706 (1983) (“We conclude that when an officer’s observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of Terry and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope”); United States v. Frost, 999 F.2d 737, 741 n.1 (3d Cir.), cert. denied, 510 U.S. 1001 (1993) (Same); United States v. McFarley, 991 F.2d 1188, 1192 (4th Cir.), cert. denied, 510 U.S. 949 (1993) (Same).
- e. **Reasonable Suspicion May Be Established in a Variety of Ways.** “An officer who performs an investigatory stop ‘must be able to point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant that intrusion.’” United States v. Baskin, 410 F.3d 788, 792 (7th Cir. 2005) (citing Terry, 392 U.S. at 21). Reasonable suspicion may be established in a variety of ways, including:
- 1) **An Officer’s Personal Observations Can Establish Reasonable Suspicion.** A law enforcement officer’s personal observations may form the basis for reasonable suspicion to conduct an investigative detention. Terry, *supra*. A great deal of deference is given to the personal observations of a law enforcement officer. See, e.g., United States v. Cortez, 449 U.S. 411, 418 (1981) (“A trained officer draws inferences and makes deductions - inferences and deductions that might well elude an untrained person”); United States v. Jacob, 377 F.3d 573, 578 (6th Cir. 2004) (Reasonable suspicion established, in part, because officers observed defendant engage in countersurveillance); United States v. Hurt, 376 F.3d 789, 792-93 (8th Cir. 2004) (Reasonable suspicion established by officer’s “experience and training”); United States v. Cervine, 347 F.3d 865, 867-68 (10th Cir. 2003) (Evidence of counter-surveillance supported reasonable suspicion).

- 2) **Reasonable Suspicion May Be Established Using Information Provided From Other Officers.** "Police officers are not limited to personal observations in conducting investigatory activities, and reasonable suspicion for a Terry stop may be based on information furnished by others." Romain, 393 F.3d at 71. This concept is sometimes referred to as "collective knowledge." The collective knowledge doctrine applies when "an officer (or team of officers), with direct personal knowledge of *all* the facts necessary to give rise to reasonable suspicion or probable cause, directs or requests that another officer, not previously involved in the investigation, conduct a stop, search, or arrest." United States v. Ramirez, 473 F.3d 1026, 1033 (9th Cir. 2007). See, e.g., United States v. Barnes, 506 F.3d 58, 63 (1st Cir. 2007) ("reasonable suspicion can be imputed to the officer conducting a search if he acts in accordance with the direction of another officer who has reasonable suspicion"); United States v. Hensley, 469 U.S. 221, 232 (1985) (Information justifying stop came from flyer issued by another jurisdiction); United States v. Longmire, 761 F.2d 411, 419 (7th Cir. 1985) (Information came from a four-hour old radio bulletin); United States v. Hinojos, 107 F.3d 765, 768 (10th Cir. 1997) ("Under the 'fellow officer' rule ... law enforcement officers may pool their information and ... reasonable suspicion is to be determined on the basis of the collective knowledge of all the officers involved"); and United States v. Erwin, 155 F.3d 818, 822 (6th Cir. 1998), cert. denied, 525 U.S. 1123 (1999) ("A law enforcement officer is generally justified in stopping an individual and asking for identification when relying on information transmitted by a valid police bulletin").
- 3) **Reasonable Suspicion May Be Established Using Information Provided By a Third Party.** Information from a third party, such as a victim or witness, can provide the facts necessary to justify reasonable suspicion in the same way victim or witness information can be used to establish probable cause.

- 4) **Reasonable Suspicion May Be Established Using Information Provided By An Informant or Anonymous Source.** It is not uncommon for an informant or anonymous source to provide the information necessary to establish reasonable suspicion. While this is permissible, additional corroboration will generally be required in these instances before reasonable suspicion can be established.
- a) **Reliability Depends on Quantity and Quality of Information.** The reliability of a tip provided by an informant depends on both the “quantity and quality” of the information provided by the source. Alabama v. White, 496 U.S. 325, 330 (1990). Of course, it should be remembered that “[r]easonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.” Id. at 330.
- b) **Tips From Known Informants or Sources.** Tips from known informants or sources can be used to justify reasonable suspicion.
- (1) **Known Informants.** A tip from a confidential informant with an established track record may contain sufficient indicia of reliability that it establishes reasonable suspicion under the totality of the circumstances with little or no corroboration. See, e.g., White, 496 U.S. at 330 (Court noted that in Adams v. Williams, 407 U.S. 143 (1972), they “assumed that the unverified tip from the known informant might not have been reliable enough to establish probable cause, but nevertheless found it sufficiently reliable to justify a Terry stop”); United States v. Woosley, 361 F.3d 924, 927 (6th Cir. 2004)(“[A]n affidavit including a tip from an informant that has been proven to be reliable may support a finding of probable cause [and reasonable suspicion] in the absence of any corroboration”)(citation omitted).

- (2) **Quasi-Anonymous Sources.** "While 'a tip might be anonymous might be anonymous in some sense,' it may have 'certain other features, either supporting reliability or narrowing the likely class of informants, so that the tip does provide the lawful basis for some police action.'" Terry-Crespo, 356 F.3d at 1174 (citation omitted).
- c) **Tips From Anonymous Informants.** "Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated ... 'an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity.'" Florida v. J.L., 529 U.S. 266, 270 (2000)(internal citations omitted). "A tipster who refuses to identify himself may simply be making up the story, perhaps trying to use the police to harass another citizen." United States v. Johnson, 364 F.3d 1185, 1190 (10th Cir. 2004). Accordingly, a tip from an anonymous source may be sufficient to establish reasonable suspicion, but must have some degree of reliability associated with its "assertion of illegality." J.L., 529 U.S. at 272. See also Romain, 393 F.3d at 71 ("An officer may rely upon an informant's tip to establish reasonable suspicion only if the information carries "sufficient 'indicia of reliability'" to warrant acting upon it. That determination entails an examination of all the circumstances bearing upon the tip itself and the tipster's veracity, reliability, and basis of knowledge"). "If a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable." White, 496 U.S. at 330. In determining whether an anonymous tip contains enough verifiable information to establish reasonable suspicion, courts rely upon the following types of factors:

- (1) **The Amount of Detail Provided By the Source.**
See, e.g., United States v. Nelson, 284 F.3d 472, 480 (3rd Cir. 2002) (citation omitted)(Noting that “even though [a] tip [is] wholly anonymous, the details provided in the tip [may be] sufficiently particularized and accurate to reflect a ‘special familiarity’ with the subject of the information”); *Ganser*, 315 F.3d at 843 (“In determining whether a tip has furnished ‘enough verifiable information to provide reasonable suspicion, courts examine [*inter alia*] the amount of information given”); *United States v. Gonzalez*, 190 F.3d 668, 672 (5th Cir. 1999)(Among factors to be considered in determining whether tip establishes reasonable suspicion is “the specificity of the information contained in the tip or report”); *United States v. Wheat*, 278 F.3d 722, 731 (8th Cir. 2001), *cert. denied*, 537 U.S. 850 (2002)(Discussing tip in context of a traffic stop, court noted “the anonymous tipster must provide a sufficient quantity of information”).
- (2) **Whether the Source Predicts Future Behavior.**
See, e.g., White, 496 U.S. at 332 (Noting importance of source’s “ability to predict respondent’s future behavior, because it demonstrated inside information”); *Ganser*, 315 F.3d at 843 (Where the anonymous source “accurately predicted future behavior,” this “demonstrate[ed] inside information and a special familiarity” with the suspect’s criminal activity); *United States v. Patterson*, 340 F.3d 368, 371 (6th Cir. 2003) (Holding *Terry* stop impermissible in that “anonymous tip ... offered no reliable or meaningful information in support of reasonable suspicion because it was not specific enough as to a prediction of future unlawful activities”).

- (3) **Whether and to What Extent the Police Corroborate the Source's Information.** See, e.g., White, 496 U.S. at 331 (Court noted that, where "an informant is shown to be right about some things, he is probably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity"); Perkins, 363 F.3d at 322 ("Before deciding to make an investigative stop, Officer Burdette confirmed important aspects of the tip. The fact that he found the two white males in a red car with a silver or white stripe at the precise duplex reported, just as the caller had corroborated, offers important corroboration of the tip"); Ganser, 315 F.3d at 843 ("In determining whether a tip has furnished 'enough verifiable information to provide reasonable suspicion, courts examine [*inter alia*] ... the amount of police corroboration") (citation omitted) Gonzalez, 190 F.3d at 672 (Among factors to be considered in determining whether tip establishes reasonable suspicion is "the extent to which the information in the tip or report can be verified by officers in the field").
- (4) **Whether the Information is Based Upon the Tipster's First-Hand Observations.** Where the information provided by the tipster is based upon his or her own first-hand observations, the tip is entitled to greater weight than might otherwise be the case. See, e.g., Illinois v. Gates, 462 U.S. 213, 234 (1983)(Noting that informant's "explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case"); Perkins, 363 F.3d at 322 (Where the "tip itself made clear both that the caller was in close proximity to the duplex and that the caller had personally observed the men," the tipster's "contemporaneous viewing of the suspicious activity" served to "enhance the tip's reliability"); United States v. Holmes, 360 F.3d 1339, 1343 (D.C. Cir. 2004)(Where informant "supplied the police with an eye-witness account of criminal activity" that was "based upon firsthand observation," tip was entitled to greater weight).

- (5) **Whether the Information Places the Anonymity of the Source in Jeopardy.** "If an informant places his anonymity at risk, a court can consider this factor in weighing the reliability of the tip." J.L., 529 U.S. at 276 (Kennedy, J., concurring). See *a/so* Heard, 367 F.3d at 1279 ("The reliability of a tip is considered in light of all relevant circumstances, which include ... a consideration of whether the officer can track down the tipster again"); Holmes, 360 F.3d at 1344 (Informant's tip entitled to greater weight because informant "placed his anonymity at risk" by "subjecting himself to ready identification by the police"); Terry-Crespo, 356 F.3d at 1176 (Reliability of an informant's tip supported by fact that source "jeopardized any anonymity he might have had by calling 911 and providing his name to an operator during a recorded call").

- (6) **Whether the Information Was Provided in a Face-to-Face Encounter.** Where a tip is provided to the police in a face-to-face encounter, courts typically consider the “report inherently more trustworthy.” United States v. Thompson, 234 F.3d 725, 729 (D.C. Cir. 2000), cert. denied, 532 U.S. 1000 (2001). See also Romain, 393 F.3d at 73 (“Unlike a faceless telephone communication from out of the blue, a face-to-face encounter can afford police the ability to assess many of the elements that are relevant to determining whether information is sufficiently reliable to warrant police action. A face-to-face encounter provides police officers the opportunity to perceive and evaluate personally an informant’s mannerisms, expressions, and tone of voice (and, thus, to assess the informant’s veracity more readily than could be done from a purely anonymous telephone tip). In-person communications also tend to be more reliable because, having revealed one’s physical appearance and location, the informant knows that she can be tracked down and held accountable if her assertions prove inaccurate. Finally, a face-to-face encounter often provides a window into an informant’s represented basis of knowledge; for example, her physical presence at or near the scene of the reported events can confirm that she acquired her information through first-hand observation”); Heard, 367 F.3d at 1279 (“A face-to-face anonymous tip is presumed to be inherently more reliable than an anonymous telephone tip because the officers receiving the information have an opportunity to observe the demeanor and perceived credibility of the informant”); United States v. Valentine, 232 F.3d 350, 354 (3d Cir. 2000), cert. denied, 532 U.S. 1014 (2001)(Noting “a tip given face to face is more reliable than an anonymous telephone call,” in that, “when an informant relates information to the police face to face, the officer has an opportunity to assess the informant’s credibility and demeanor”); United States v. Christmas, 222 F.3d 141, 144 (4th Cir. 2000), cert. denied, 531 U.S. 1098 (2001)(Noting “face-to-face encounter[s] ... [do] did not pose this same credibility problem[s]” as do anonymous telephone tips); United States v. Salazar, 945 F.2d 47, 50-51 (2d Cir. 1991), cert. denied, 504 U.S. 923 (1992)(Noting “a face-to-face informant must, as a general matter, be thought

more reliable than an anonymous telephone tipster, for the former runs the greater risk that he may be held accountable if his information proves false"); United States v. Sierra-Hernandez, 581 F.2d 760, 763 (9th Cir.), cert. denied, 439 U.S. 936 (1978) ("Unlike a person who makes an anonymous telephone call, this informant confronted the agent directly").

- (7) **The Timeliness of the Source's Report.** *See, e.g.,* White, 407 U.S. at 147 (Noting that, "when the victim of a street crime seeks immediate police aid and gives a description of his assailant," immediate action may be required); Terry-Crespo, 356 F.3d at 1177 (Noting "police may ascribe greater reliability to a tip, even an anonymous one, where an informant 'was reporting what he had observed moments ago,' not stale or second-hand information")(citations omitted); Wheat, 278 F.3d at 731; Thompson, 234 F.3d at 729 (Noting that "the recency and the proximity" of the tipster's observation "suggested that it would prove accurate"); Valentine, 232 F.3d at 354 (Noting "officers could expect that the informant had a reasonable basis for his beliefs," in that "the officers ... knew that the informant was reporting what he had observed moments ago, not what he learned from stale or second-hand sources"); Gonzalez, 190 F.3d at 672 (Among factors to be considered in determining whether tip establishes reasonable suspicion is "whether the tip or report concerns active or recent activity, or has instead gone stale").
- (8) **Whether the Source Provided Information Concerning a Neighbor of or Someone Who Lived Close to the Source.** *See, e.g.,* Christmas, 222 F.3d at 144 ("By informing the police about her neighbors' illegal activity, the informant exposed herself to the risk of reprisal. The fact that she provided the report to uniformed police officers in public only increased the probability that someone associated with the illegal activity would witness her aid to the police"); Valentine, 232 F.3d at 354 ("[W]hen an informant gives the police information about a neighbor ... or someone nearby ... the informant is exposed to a risk of retaliation from the person named, making it less likely that the informant will lie").

f. **Various Factors Can Be Used to Justify Investigative Detentions.**

Law enforcement officers can utilize a wide variety of factors to justify an investigative detention. “Acts that in isolation may be ‘innocent in itself’ or at least susceptible to an innocent interpretation, may collectively amount to reasonable suspicion.” United States v. Nelson, 284 F.3d 472, 480 (3rd Cir. 2002)(citation omitted). Thus, entirely innocent conduct can, in appropriate instances, justify a Terry stop. See Reid v. Georgia, 448 U.S. 438, 441 (1980)(per curiam)(“There could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot”); United States v. Arvizu, 534 U.S. 266, 277-278 (2002) (“Undoubtedly, each of these factors alone is susceptible to innocent explanation, and some factors are more probative than others. Taken together, we believe they sufficed to form a particularized and objective basis for Stoddard’s stopping the vehicle, making the stop reasonable within the meaning of the Fourth Amendment”). Some common factors used by officers to justify an investigative detention include:

- 1) **A Suspect’s Nervousness is a Factor That Can Be Used to Justify an Investigative Stop.** A suspect’s nervousness is a factor that can be considered in determining whether reasonable suspicion exists to support an investigative detention. See, e.g., Illinois v. Wardlow, 528 U.S. 119, 124 (2000)(Noting that Court recognized “nervous, evasive behavior is a pertinent factor in determining reasonable suspicion”)(citations omitted); United States v. Bloomfield, 40 F.3d 910 (8th Cir. 1994), cert. denied, 514 U.S. 1113 (1995)(“Although it is customary for people to be ‘somewhat nervous’ when Roberts pulls them over, it is unusual for people to ‘fidget’ as Bloomfield did when the stop is a ‘normal routine’ traffic stop”); United States v. Palomino, 100 F.3d 446 (6th Cir. 1996)(Noting “nervousness of a defendant is a factor which can lead to a finding of reasonable suspicion,” although “nervousness alone is not a sufficient ground upon which to base a finding of reasonable suspicion”); United States v. Jones, 269 F.3d 919, 928 (8th Cir. 2001)(“Nervousness combined with several other more revealing facts can generate reasonable suspicion”).

NOTE: Notwithstanding the above, a law enforcement officer should remember that, while nervousness is a pertinent factor a law enforcement officer could consider in determining if criminal activity was occurring, its value is limited, because “even innocent people can display some nervousness when being questioned by police.” Johnson, 364 F.3d at 1192. See, e.g., United States v. Wood, 106 F.3d 942, 948 (10th Cir. 1997) (Reiterating that “nervousness is of limited significance in determining reasonable suspicion and that the government’s repetitive reliance on ... nervousness ... as a basis for reasonable suspicion ... must be treated with caution”); Jones, 269 F.3d at 928 (While acknowledging nervousness as a factor, emphasizing that “generally, however, ‘nervousness is of limited significance in determining reasonable suspicion’”) (citation omitted).

- 2) **A Suspect’s Criminal History Can Be Considered to Justify an Investigative Detention.** A suspect’s criminal history may be utilized as a factor to justify an investigative detention, although standing alone it does not establish reasonable suspicion. See, e.g., Perkins, 363 F.3d at (“Officer Burdette identified the passenger in the car as a known drug user who lived on Knox Avenue, which further reinforced his suspicions of possible drug activity”); Wood, 106 F.3d at 949 (Cautioning that “prior criminal involvement alone is insufficient to give rise to the necessary reasonable suspicion to justify shifting the focus of an investigative detention from a traffic stop to a narcotics or weapons investigation. If the law were otherwise, any person with any sort of criminal record ... could be subjected to a Terry-type investigative stop by a law enforcement officer at any time without the need for any other justification at all”)(citations omitted); Palomino, 100 F.3d at 450 (“Investigation which revealed Palomino’s past involvement in criminal activities” one factor justifying reasonable suspicion of criminal activity).
- 3) **Knowledge of Recent Criminal Conduct.** Where a law enforcement officer has “[k]nowledge of ... recent relevant criminal conduct,” this knowledge “is a permissible component of the articulable suspicion required for a Terry stop.” United States v. Feliciano, 45 F.3d 1070, 1074 (7th Cir.), cert. denied, 516 U.S. 853 (1995).

- 4) **The Time and Location of a Situation are Factors That Can Be Considered in Determining Whether Reasonable Suspicion Exists.** The time and location of a given situation may be factors to consider in determining whether reasonable suspicion exists. See, e.g., United States v. Lenoir, 318 F.3d 725, 729 (7th Cir.), cert. denied, ___ U.S. ___, 124 S. Ct. 110 (2003) (“Police observation of an individual, fitting a police dispatch description of a person involved in a disturbance, ***near in time and geographic location to the disturbance***, establishes a reasonable suspicion that the individual is the subject of the dispatch”)(emphasis added); United States v. Edmonds, 240 F.3d 55, 60 (D.C. Cir. 2001)(Court noted that the defendant’s “presence in a van parked after hours in a school lot known to be the site of numerous drug transactions” contributed to finding of reasonable suspicion).
- 5) **A Suspect’s Flight Upon Observing Law Enforcement Officers Can Be Considered in Determining Whether Reasonable Suspicion Exists.** A suspect’s flight upon observing law enforcement officers may be considered in determining whether reasonable suspicion exists. See, e.g., Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (“Headlong flight - wherever it occurs - is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such”); United States v. Bonner, 363 F.3d 213, 217 (3rd Cir. 2004)(Noting that, while the Supreme Court “has never held unprovoked flight alone is enough to justify a stop,” the Court has held, however, “that flight upon noticing police, plus some other indicia of wrongdoing, can constitute reasonable suspicion”).

NOTE: In *Bonner*, *supra*, a vehicle was lawfully stopped by the police. Before the officers could approach, however, one of the passengers jumped out of the car and fled. The police gave chase and ultimately seized the passenger, who was found to have drugs on his person. The defendant alleged his seizure was unlawful because the only reason the police had to stop him was his flight. In rejecting this contention, the Third Circuit Court of Appeals held that “[f]light from a non-consensual, legitimate traffic stop (in which the officers are authorized to exert superintendence and control over the occupants of the car) gives rise to reasonable suspicion.” *Id.* at 218.

- 6) **A Suspect's Presence in a High Crime Area Can Be Considered.** A suspect's presence in a high crime area, when combined with other factors, can support reasonable suspicion. See, e.g., *Brown v. Texas*, 443 U.S. 47, 52 (1979) ("The fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct"); *Wardlow*, 528 U.S. at 124 ("An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime") (citation omitted); *Baskin*, 401 F.3d 788, 793 (7th Cir. 2005) (Suspect's apparent flight, combined with his close proximity to "a newly discovered methamphetamine lab in an otherwise remote county park at a time when most people are asleep," justified *Terry* stop); *Bonner*, 363 F.3d at 217 ("Mere presence in an area known for high crime does not give rise to reasonable suspicion for a stop"); *United States v. Mayo*, 361 F.3d 802, 807 (4th Cir. 2004) ("Although standing alone this factor may not be the basis for reasonable suspicion to stop anyone in the area, it is a factor that may be considered along with others to determine whether police have a reasonable suspicion based on the totality of the circumstances") (internal citation omitted).
- 7) **A Suspect's Behavior May Be Considered.** See, e.g., *United States v. Maguire*, 359 F.3d 71, 77 (1st Cir. 2004) (Reasonable suspicion existed, in part, based upon suspect's "disheveled" appearance, and responses to officers' questions that were "less than forthcoming" and provided while he was "walking away from the officers"); *United States v. McCarthy*, 77 F.3d 522, 531 (1st Cir.), *cert. denied*, 519 U.S. 991 (1996) (Finding that providing vague and evasive responses to officers' questions is relevant in evaluating the propriety of a *Terry* stop).
- 8) **Profiles May Be Used to Support an Investigative Detention.** In *United States v. Sokolow*, 490 U.S. 1, 10 (1989), the Supreme Court approved the use of a "drug courier profile" by federal agents. As noted by the Court: "A court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that conclusion, but the fact that these factors may be set forth in a 'profile' does not somehow detract from their evidentiary significance as seen by a trained agent." *Id.*

- g. **The Length of an Investigative Detention Must Be Reasonable.** "An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." Florida v. Royer, 460 U.S. 491, 500 (1983). "The investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." Id. Furthermore, "it is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." Id. So, while a Terry stop "permits law enforcement to detain a person briefly in order to investigate the circumstances that provoke suspicion," United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975), "when a law enforcement officer no longer has any reasonable suspicions of criminal activity, the detained individual is constitutionally free to leave." Erwin, 155 F.3d at 823. If an investigative stop extends beyond its lawful duration, then a *de facto* arrest requiring probable cause has occurred.
- 1) **There is No Bright-Line Time Limit for Investigative Stops.** "There is no talismanic time beyond which any stop initially justified on the basis of Terry becomes an unreasonable seizure under the Fourth Amendment." United States v. Davies, 768 F.2d 893, 901 (7th Cir.), cert. denied, 474 U.S. 1008 (1985). See, e.g., United States v. Place, 462 U.S. 696, 709-10 (1983)(Court declined to adopt any outside time limitation on a permissible Terry stop, but held that a ninety-minute detention of luggage was unreasonable based on all the facts); United States v. Acosta, 363 F.3d 1141, 1147 (11th Cir. 2004)("There is no rigid time limitation or bright line rule regarding the permissible duration of a Terry stop")(citation omitted); United States v. Vega, 72 F.3d 507, 514-16 (7th Cir. 1995)(Court upheld a sixty-two minute stop, citing the "objective reasonableness" of the officer's actions).
- 2) **A Long Duration Does Not Automatically Mean an Arrest Has Occurred.** Thus, "a long duration ... does not by itself transform an otherwise valid stop into an arrest." United States v. Owens, 167 F.3d 739, 749 (1st Cir.), cert. denied, 528 U.S. 894 (1999). Instead, courts must examine "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing." United States v. Sharpe, 470 U.S. 675, 686 (1985)(citations omitted). Thus, while "there is "no rigid time limitation on Terry stops," id. at 685, a stop may be too long if it involves "delay unnecessary to the legitimate investigation of the law enforcement officers," Id. at 687.

3) **Other Factors Must Be Considered in Determining Whether an Investigative Detention was of Lawful Duration.** “Time of detention cannot be the sole criteria for measuring the intrusiveness of the detention. Clearly, from the perspective of the detainee, other factors, including the force used to detain the individual, the restrictions placed on his or her personal movement, and the information conveyed to the detainee concerning the reasons for the stop and its impact on his or her rights, affect the nature and extent of the intrusion and, thus, should factor into the analysis.” McCarthy, 77 F.3d at 530.

h. **The Use of Force During an Investigative Detention Must Be Reasonable.** The Supreme Court “has long recognized that the right to make an ... investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.” Graham v. Connor, 490 U.S. 386, 396 (1989). “The ‘mere use ... of force in making a stop will not necessarily convert a stop into an arrest [When the] surrounding circumstances give rise to a justifiable fear for personal safety, a seizure effectuated with weapons drawn may properly be considered an investigative stop.” United States v. Heath, 259 F.3d 522, 530 (6th Cir. 2001). See also United States v. Vargas, 369 F.3d 98, 102 (2d Cir. 2004)(“[A]lthough under ordinary circumstances, drawing weapons and using handcuffs are not part of a Terry stop, intrusive and aggressive police conduct’ is not an arrest ‘when it is a reasonable response to legitimate safety concerns on the part of the investigating officers”)(citation and internal brackets omitted); United States v. Johnson, 364 F.3d 1185, 1194 (10th Cir. 2004)(“An officer may take reasonable precautions to protect his safety during an investigative detention”); United States v. Fisher, 364 F.3d 970, 973 (8th Cir. 2004)(“It is well established ... that when officers are presented with serious danger in the course of carrying out an investigative detention, they may brandish weapons or even constrain the suspect with handcuffs in order to control the scene and protect their safety”); United States v. Miles, 247 F.3d 1009, 1012 (9th Cir. 2001)(Noting that the court allows “intrusive and aggressive police conduct without deeming it an arrest ... when it is a reasonable response to legitimate safety concerns on the part of the investigating officers”); United States v. Zapata, 18 F.3d 971, 976-77 (1st Cir. 1994) (Holding that slight physical touching cannot, on its own, produce a de facto arrest).

- 1) **Pointing of Guns.** “There is no per se rule that pointing guns at people ... constitutes an arrest.” Baker v. Monroe Township, 50 F.3d 1186, 1193 (3rd Cir. 1995). Instead, “the use of guns in connection with a stop is permissible where the police reasonably believe the weapons are necessary for their protection.” United States v. Perdue, 8 F.3d 1455, 1462 (10th Cir. 1993)(internal quotation marks, brackets, and citations omitted). See, e.g., Maguire, 359 F.3d at 78 (“It is well established that the use or display of a weapon does not alone turn an investigatory stop into a de facto arrest”)[citing United States v. Trueber, 238 F.3d 79, 94 (1st Cir. 2001)]; United States v. Navarrete-Barron, 192 F.3d 786, 791 (8th Cir. 1999); United States v. Alvarez, 899 F.2d 833, 838 (9th Cir. 1990), cert. denied, 498 U.S. 1024 (1991); United States v. Taylor, 857 F.2d 210, 214 (4th Cir. 1988); United States v. Serna-Barreto, 842 F.2d 965, 968 (7th Cir. 1988); United States v. Jones, 759 F.2d 633, 638 (8th Cir.), cert. denied, 474 U.S. 837 (1985); United States v. Roper, 702 F.2d 984, 987-88 (11th Cir. 1983); United States v. Jackson, 652 F.2d 244, 249 (2d Cir.), cert. denied, 454 U.S. 1057 (1981).
- 2) **Use of Handcuffs.** “Nor does the use of handcuffs exceed the bounds of a Terry stop, so long as the circumstances warrant that precaution.” Houston v. Clark County Sheriff Deputy John Does 1-5, 174 F.3d 809, 815 (6th Cir. 1999). As one court has noted: “Because safety may require the police to freeze temporarily a potentially dangerous situation ... the use of handcuffs may be part of a reasonable Terry stop.” United States v. Merkley, 988 F.2d 1062, 1064 (10th Cir. 1993). See, e.g., Navarrete, 192 F.3d 791; Perdue, 8 F.3d at 1463; United States v. Esieke, 940 F.2d 29, 36 (2d Cir.), cert. denied, 502 U.S. 992 (1991); United States v. Crittendon, 883 F.2d 326, 329 (4th Cir. 1989); United States v. Hastamorir, 881 F.2d 1551, 1557 (11th Cir. 1989).
- 3) **When Does the Amount of Force Used Turn an Investigative Detention Into an Arrest?** In determining whether the amount of force used during an investigative detention has turned the stop into an arrest, courts consider a number of factors, including:
 - a) The number of officers and police cars involved;
 - b) The nature of the crime and whether there is reason to believe the suspect is armed;
 - c) The strength of the officer’s articulable, objective suspicions;
 - d) The need for immediate action by the officer;
 - e) The presence or lack of suspicious behavior or movement by the person under observation;

- f) Whether there was an opportunity for the officer to have made the stop in less threatening circumstances.

United States v. Thompson, 906 F.2d 1292, 1296 (8th Cir.), cert. denied, 498 U.S. 989 (1990).

- i. **A Suspect's Refusal to Cooperate May Not Be Used to Justify an Investigative Detention.** The Supreme Court has "consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." Bostick, 501 U.S. at 437 [*citing* INS v. Delgado, 466 U.S. 210, 216-217 (1984); Royer, 460 U.S. at 498 (plurality opinion); Brown v. Texas, 443 U.S. 47, 52-53 (1979)]; Mayo, 361 F.3d at 806 (4th Cir. 2004)("A suspect's refusal to cooperate with police, without more, does not satisfy Terry stop requirements"); United States v. Wood, 106 F.3d 942, 946 (10th Cir. 1997)("The failure to consent to a search cannot form any part of the basis for reasonable suspicion").
- j. **Police Officers May Require a Suspect to Identify Himself During an Investigative Detention.** The Supreme Court has long recognized the importance of determining a suspect's identity during a Terry stop. See, e.g., Michigan v. Summers, 452 U.S. 692, 700 n.12 (1981)("It is clear that there are several investigative techniques which may be utilized effectively in the course of a Terry-type stop. The most common is interrogation, which may include both a request for identification and inquiry concerning the suspicious conduct of the person detained")(citation omitted)(emphasis added); Adams v. Williams, 407 U.S. 143, 146 (1972)(Noting "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time")(emphasis added). Accordingly, where a suspect refuses during a valid Terry stop to provide his name, he may be arrested for that refusal under a **state's** "stop and identify" statute. Hibel v. Sixth Judicial District Court, 542 U.S. 177, 188 (2004)("A state law requiring a suspect to disclose his name in the course of a valid Terry stop is consistent with Fourth Amendment prohibitions against unreasonable searches and seizures").

8. **During an Investigative Detention, a Suspect May Be Patted-Down for Weapons in Certain Circumstances.** In *Terry, supra*, the Supreme Court outlined the legal requirements for what has become known as a "*Terry* frisk." If, during an investigative detention, a law enforcement officer develops reasonable suspicion that the individual is presently armed and dangerous, the officer may conduct a limited pat-down search of the individual for weapons. However, "[a] *Terry* stop cannot be used as the basis of a 'full search' that would normally be warranted only by the existence of probable cause, consent, or a valid arrest." *United States v. Hardy*, 855 F.2d 753, 759 (11th Cir. 1988), *cert. denied*, 489 U.S. 1019 (1989)(citation omitted).
- a. **Terry Frisk Defined.** A *Terry* frisk is a pat-down search of a suspect's outer clothing to discover weapons that could be used during an investigative stop. A law enforcement officer may not utilize a *Terry* frisk in an effort to look for evidence of a crime. See *Adams v. Williams*, 407 U.S. 143, 146 (1972)("The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence"); *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993)("If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed"). Nonetheless, if evidence is uncovered during valid *Terry* frisk for weapons, the evidence can be seized and used against the suspect. This concept will be discussed in the "Plain Touch" section, below.

NOTE: It should be noted that “Terry does not in terms limit a weapons search to a so-called 'pat-down' search. Any limited intrusion designed to discover guns, knives, clubs or other instruments of assault are permissible.” United States v. Reyes, 394 F.3d 219, 225 (5th Cir. 2003), cert. denied, 540 U.S. 1228 (2004) [*citing United States v. Hill*, 545 F.2d 1191, 1193 (9th Cir. 1976)]. So, for example, “the raising of a suspect’s shirt by a law enforcement officer does not violate the bounds established by Terry.” United States v. Jackson, 390 F.3d 393, 399 (5th Cir. 2004)(citation omitted), vacated on other grounds, 544 U.S. 917 (2005), nor “does directing a suspect to lift his shirt to permit an inspection for weapons.” Reyes, 349 F.3d at 225. *See also* United States v. Edmonds, 1998 U.S. App. LEXIS 10807, at *11-12 (4th Cir.), cert. denied, 525 U.S. 912 (1998) (Officer’s actions in directing suspect to lift shirt, then raising corner of suspect’s baggy shirt after suspect refused to do so, “represented a sensible safety measure, while only minimally intruding on Edmonds’ personal security”); United States v. Baker, 78 F.3d 135, 138 (4th Cir. 1996), cert. denied, 522 U.S. 1051 (1998) (“Directing that he raise his shirt required little movement by Baker and allowed Officer Pope to immediately determine whether Baker was armed without having to come in close contact with him. And, it minimized the risk that he could draw his weapon before Officer Pope could attempt to neutralize the potential threat. ... Indeed, this act was less intrusive than the patdown frisk sanctioned in Terry”). The same rationale permits LEO, confronted with a suspect whose steerhide motorcycle jacket is sufficiently stiff and thick to conceal weapons hidden beneath from detection through a pat-down, to require the suspect to remove the jacket.

- b. **An Officer Must Meet Two Requirements to Justify a Terry Frisk.** In order to justify a Terry frisk, a law enforcement officer must demonstrate two things: *** First, that the suspect is lawfully stopped; and second, that he had reasonable suspicion the suspect was armed and dangerous.

- 1) **The First Requirement For a Terry Frisk is That the Suspect is Lawfully Stopped.** This requirement is ordinarily met when LEO reasonably suspect that the suspect has, is or is about to commit a crime. Generally, "policemen have no more right to 'pat down' the outer clothing of passers-by, or persons to whom they address casual questions, than does any other citizen. Terry, 392 U.S. at 32 (Harlan, J., concurring). Instead, "[i]f the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a forcible stop. Id. See also Adams, 407 U.S. at 146 (***"So long as the officer is entitled to make a forcible stop***, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose")(internal footnote and citation omitted) (emphasis added); United States v. Burton, 228 F.3d 524, 528 (4th Cir. 2000)("But an officer may not conduct this protective search for purposes of safety until he has a reasonable suspicion that supports the investigatory stop").
- 2) ***** But In the Special Context of a Vehicle Stop, This First Requirement Can Be Met for All Vehicle Occupants by the Lawful Stop of the Vehicle They Occupy.** Arizona v. Johnson, 129 S. Ct. 781, 2009 U.S. LEXIS 868 (2009) approved the frisk of a passenger in a vehicle lawfully stopped to investigate an invalid license plate. Although there was no reason to suspect Johnson (one of the passengers) of a crime, one of the officers wanted to interview him. Reasonably suspecting that Johnson was armed and presently dangerous (a suspicion validated by the lower court following Supreme Court remand), the officer frisked Johnson and found an illegally possessed weapon. Citing the heightened concern for officer safety in vehicle stops and the Court's holding in Brendlin v. California, 551 U.S. 249 (2007) ("For the duration of a traffic stop, we recently confirmed, a police officer effectively seizes 'everyone in the vehicle,' the driver and all passengers", Johnson, 129 S.Ct at 784), the Supreme Court found the frisk lawful even though there was no reason to suspect Johnson of a crime.

- 3) **The Second Requirement For a Terry Frisk is That the Officer Have Reasonable Suspicion That a Suspect is Armed and Dangerous.** In order to conduct a Terry frisk, a law enforcement officer must also have reasonable suspicion that a suspect is presently armed and dangerous. As noted in Terry, supra: "Where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous ... he is entitled for the protection of himself and others in the area to conduct a carefully limited search...." Terry, 392 U.S. at 30.
- c. **A Terry Frisk is Limited to Those Areas Where a Weapon Could Be Located.** The frisk allowed by Terry, supra is limited in nature to looking in areas where weapons could be located. Terry, 392 U.S. at 229 ("The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer"); Adams, 407 U.S. at 146 ("The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons might be equally necessary and reasonable, whether or not carrying a concealed weapon violated any applicable state law").
- d. **A Terry Frisk May Be Permissible Even Where the Suspect Has Been Handcuffed.** A Terry frisk of a suspect may be conducted even after the suspect has been restrained through the use of handcuffs. *See, e.g., United States v. Sanders*, 994 F.2d 200, 209-10 (5th Cir.), cert. denied, 510 U.S. 955, and cert denied, 510 U.S. 1014 (1993)(In upholding frisk of handcuffed suspect, court noted: "Sander's argument is entirely dependent on the assumption that, by handcuffing a suspect, the police instantly and completely eliminate all risks that the suspect will flee or do them harm. As is sadly borne out in the statistics for police officers killed and assaulted in the line of duty each year, however, this assumption has no basis in fact"); United States v. Holmes, 376 F.3d 270, 280 (4th Cir.), cert. denied, 543 U.S. 1011, 125 S. Ct. 633 (2004)(Frisk of vehicle upheld even though occupants had been removed and handcuffed based upon "the reasonable belief that the suspect [might] return to the vehicle following the conclusion of the Terry stop");

- e. **Terry Frisks of Containers are Allowed.** When reasonable suspicions exists that a suspect is presently armed and dangerous, a law enforcement officer may also frisk any containers in the suspect's possession. See, e.g., United States v. Vigo, 487 F.2d 295, 298 (2d Cir. 1973) (Noting "a lady's handbag is the most likely place for a woman ... to conceal a weapon," the court upheld the frisk of a woman's purse as a "normal protective measure on the part of law enforcement authorities"); United States v. Miller, 468 F.2d 1041, 1045 (4th Cir. 1972), cert. denied, 410 U.S. 935 (1973)(Frisk of woman's handbag found reasonable where facts supported officer's belief "that she might be armed"); United States v. Barlin, 686 F.2d 81, 87 (2d Cir. 1982)(Frisk of purse permissible where "so long as the purse remained unopened, it was a source of danger to the agents"); United States v. McClinnhan, 660 F.2d 500, 504 (D.C. Cir. 1981)(Frisk of briefcase upheld where "merely separating McClinnhan from his briefcase ... would obviate the danger only for the length of the stop; at some point, they would be compelled to return the briefcase to appellant and thus place themselves in the very danger they sought to avoid"); United States v. Flippin, 924 F.2d 163, 164 - 167 (9th Cir. 1991)(Frisk of make-up bag permissible where officer believed the bag contained a weapon "because the bag felt heavy" and "merely gaining control of the bag did not dissipate the danger and exigent circumstances").

NOTE: Students often ask whether a container may be opened during a “frisk,” or if they are limited to simply feeling the outside of the bag for weapons. When the container is hard-sided (e.g., a briefcase), the answer to this question is obvious. Soft-sided containers may appear to present a more difficult question, but that doesn’t seem to have originated. Useful on this point is United States v. Shranklen, 315 F.3d 959, 964 (8th Cir.), cert. denied sub nom. Fleming v. United States, 538 U.S. 971 (2003). There, officers opened a pouch found during a traffic stop of a vehicle. In finding that the officer “was not constitutionally required to pat down the pouch instead of opening it.” id. at 963, in that “there is no guarantee that merely feeling the pouch would have led [the officer] to discover the weapon.” id. at 964. The court continued: “For example, some type of padding could have enveloped the weapon, or the weapon could have been a pocketknife with an unexposed blade. It was therefore reasonable for [the officer] to open the pouch in order to inspect for weapons with his sense of sight and not solely with his sense of touch. We also note the resemblance here to Long, where police officers searched a car for weapons and found a pouch. Upon looking inside the pouch, the officers discovered it contained marijuana; the Supreme Court gave no indication that the officers should have patted down the pouch first.” Id.

- f. **Establishing Reasonable Suspicion to Frisk a Suspect Can Be Established in a Variety of Ways.** As with investigative stops (see subparagraph (5)(c), above), law enforcement officers may establish reasonable suspicion that a suspect is presently armed and dangerous in a variety of different means, including:
- 1) **Personal Observations;**
 - 2) **Information From Other Officers;** and
 - 3) **Information From Third Parties.**

- g. **Various Factors Can Be Used to Justify a Terry Frisk.** As with investigative stops, the list of factors that may be used as justification for a Terry frisk is extensive. “[T]he standard is whether the pat-down search is justified in the totality of circumstances, even if each individual indicator would not by itself justify the intrusion.” United States v. Brown, 188 F.3d 860, 865 (7th Cir. 1999). The courts will consider the officer’s opinion, based on training and experience, as to whether certain facts and circumstances demonstrated a legitimate threat. United States v. Rideau, 969 F.2d 1572, 1575 (“Trained, experienced officers. . . may perceive danger where an untrained observer would not.”). Among the most common factors used by law enforcement officers to justify a Terry frisk are the following:

- 1) **A Suspect’s Reputation May Be Considered.** “[R]easonable suspicion of a suspect’s dangerousness need not be based solely on activities observed by the police during or just before the relevant police encounter, but can be based on the suspect’s commission of violent crimes in the past - especially when those crimes indicate a high likelihood that the suspect will be ‘armed and dangerous’ when encountered in the future.” Holmes, 376 F.3d at 278 (Upholding frisk based, in part, on officer’s knowledge “of the suspects’ criminal history *and* that the gang to which the suspects belonged was known to be armed”). Thus, where a suspect has a reputation for being armed and dangerous, such as through his past criminal history or association with violent gangs, a law enforcement officer can use this fact as justification for a Terry frisk. See, e.g., United States v. Perrin, 45 F.3d 869, 873 (4th Cir.), cert. denied, 515 U.S. 1126 (1995) (Among factors justifying frisk of the defendant was his “violent criminal past”); United States v. Strahan, 984 F.2d 155, 157 (6th Cir. 1993)(Terry frisk justified, in part, because of “the defendant’s alleged membership in the Banditos motorcycle gang, a group whose members carry weapons”).
- 2) **A Bulge in the Suspect’s Clothing May Be Considered.** A bulge in a suspect’s clothing that could mean the presence of a weapon is a factor that law enforcement officers can use to justify a Terry frisk. Pennsylvania v. Mimms, 434 U.S. 106, 112 (1977)(“The bulge in the jacket permitted the officer to conclude that Mimms was armed and thus posed a serious and present danger to the safety of the officer. In these circumstances, any man of ‘reasonable caution’ would likely have conducted the ‘pat-down’”).

- 3) **Where a Suspect Makes Furtive Movements, That Factor Can Be Used to Justify a Terry Frisk.** A "furtive" movement by the defendant is a factor that can be used to justify a Terry frisk. See, e.g., United States v. Holmes, 385 F.3d 786, 789 (D.C. Cir. 2004)(Upholding frisk of suspect in part because during the traffic stop, the officer observed the suspect "reaching under his seat as if to hide or retrieve a weapon"); United States v. Cash, 378 F.3d 745, 748 (8th Cir. 2004)("Cash's extreme nervousness toward the officers and her furtiveness in concealing the shopping bag from the officers were significant factors which ... may establish reasonable suspicion for a Terry stop and frisk") United States v. Michelletti, 991 F.2d 183, 185 (5th Cir. 1993), reh'g en banc, 13 F.3d 838 (5th Cir.), cert. denied, 513 U.S. 829 (1994)("The fact that he kept his right hand in his pocket at all times, given the surrounding circumstances, was reason enough to suspect Michelletti of possibly being armed and warranted the pat down frisk for the officers' and, possibly, the bystanders' safety"); United States v. Quarles, 955 F.2d 498, 501-502 (8th Cir.), cert. denied, 504 U.S. 944 (1992)("Officer Flaherty's decision to frisk Brown to determine if he was armed was permissible, especially since Flaherty saw Brown put his hands inside his pants").
- 4) **The Suspect's Behavior.** During a Terry stop, a suspect's words and actions can give rise to the reasonable suspicion necessary to conduct a frisk. See, e.g., Holmes, 385 F.3d at 790 (Frisk of suspect justified in part where suspect had been drinking and "continuously reached for his pocket despite repeatedly being directed not to do so" by the officer); United States v. Wallen, 388 F.3d 161, 166-67 (5th Cir. 2004)(Frisk of vehicle justified, in part, on fact that suspect "disobeyed [the officer's] instruction to 'hang tight' at the rear of the truck," then "delayed in complying with the instruction to return when he subsequently left his position"); United States v. Rideau, 969 F.3d 1572, 1575 (5th Cir. 1992) (detainee's act of backing away from officer could, under the circumstances, be construed as an attempt to gain room to use a weapon); United States v. Bell, 762 F.2d 495, 501 (6th Cir. 1985) ("Bell's failure to follow [the FBI agent's] instructions [to put his hands on the dashboard] would significantly and immediately heighten the level of concern upon the part of the officer"); United States v. Brown, 188 F.3d 860, 865 (7th Cir. 1999) (detainee "was more nervous than one would expect in a routine traffic stop," and kept "repeatedly glancing back towards the car in question").

- 5) **The Nature of Offense Under Investigation Can Be Considered in Determining Whether a Frisk is Justified.** “A police officer may base his belief that a suspect is armed and dangerous on the nature of the criminal activity despite the fact that he did not personally observe any physical indication of a weapon such as a bulge.” United States v. Terry, 718 F. Supp. 1181, 1185 (S.D.N.Y. 1989), aff’d w/o opinion, 927 F.2d 593 (2d Cir. 1991). There are some offenses that are, by their very nature, crimes in which the perpetrators are armed and dangerous. In such cases, the nature of the offense under investigation can establish the reasonable suspicion necessary for a Terry frisk. These types of crimes may include, for example:
- a) **Robbery**, Terry, *supra* ;
 - b) **Burglary and Car Theft**, United States v. Walker, 924 F.2d 1, 4 (1st Cir. 1991)(Frisk justified, in part, on the officer’s “experience that burglars often carry weapons or other dangerous objects”); United States v. Hanlon, 401 F.3d 926, 929 (8th Cir. 2005) (“[W]hen officers encounter suspected car thieves, they may also reasonably suspect that such individuals might possess weapons”);
 - c) **Drug Trafficking**, Jacob, 377 F.3d at 579 (Noting that “officers who stop a person who is ‘reasonably suspected of carrying drugs’ are ‘entitled to rely on their experience and training in concluding that weapons are frequently used in drug transactions,’ and to take reasonable measures to protect themselves”)(citation omitted); United States v. Hernandez-Rivas, 348 F.3d 595, 599 (7th Cir. 2003)(Frisk upheld where wiretaps revealed suspect owned a firearm and was engaged in drug trafficking, “a crime infused with violence”) (citation omitted); United States v. Scott, 270 F.3d 30, 41 (1st Cir. 2001), cert. denied, 535 U.S. 1007 (2002)(“When the officer suspects a crime of violence, the same information that will support an investigatory stop will without more support a frisk This Circuit has extended that rule to encompass crimes commonly associated with violence, even though the criminal act itself may be nonviolent; an example is large-scale trafficking in illegal drugs”); United States v. McMurray, 34 F.3d 1405, 1410 (8th Cir. 1994), cert. denied, 513 U.S. 1179 (1995)(“The officers’ reasonable suspicion that McMurray was dealing drugs provides an adequate basis for them to reasonably believe he might be armed and dangerous, because ‘weapons and violence are frequently associated with drug transactions’”)

- d) **Aggravated Assault.** United States v. Shambry, 392 F.3d 631, 635 (3d Cir. 2004) (“The frisk was also justified under Terry insofar as Officer Gramaglia had an articulable suspicion that Shambry had been involved in a crime of violence ...”).
- h. **The “Plain Touch” Doctrine.** In Minnesota v. Dickerson, 508 U.S. 366 (1993), the Supreme Court created what has become known as the “plain touch” doctrine. In sum, the “plain touch” doctrine is nothing more than an expansion of the “plain view” doctrine discussed in **EPO # 18**, below.
- “If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.” Id. at 375-376.
- While the purpose of a Terry frisk is to discover weapons, not evidence of a crime, the Supreme Court has “already held that police officers, at least under certain circumstances, may seize contraband detected during the lawful execution of a Terry search.” Id. at 374. See Michigan v. Long, 463 U.S. 1032, 1050 (1983) (“If, while conducting a legitimate Terry search ... the officer should, as here, discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances”); United States v. Thomson, 354 F.3d 1197, 1200 (10th Cir. 2003) (“If the police detect a weapon or contraband during a Terry search, they are entitled to seize it. This is true whether the Terry search is a simple frisk or a limited search beyond the person of the suspect”). In order to lawfully seize evidence under the “plain touch” doctrine, three (3) requirements must be met.

- 1) **The First Element of the “Plain Touch” Doctrine is that the Frisk Must Be Lawful.** First, the frisk that led to the discovery of the evidence must have been lawful. Relying upon the reasoning of Michigan v. Long, 463 U.S. 1032 (1983) and United States v. Hensley, 469 U.S. 221 (1985), the Court held the “plain touch” doctrine applies only where a law enforcement officer “lawfully pats down a suspect's outer clothing.” Dickerson, 508 U.S. at 375; Long, 436 U.S. at 1050 (Contraband discovered by officer “while conducting a legitimate Terry search” is admissible). Further, “the rationale of the plain-view doctrine is that if contraband is left in open view and is observed by a police officer from a *lawful vantage point*, there has been ... no search independent of the initial intrusion that gave the officers their vantage point.” Id. (emphasis added).

- 2) **The Second Element of the “Plain Touch” Doctrine is that the “Incriminating Nature of the Item Be Immediately Apparent.”** Second, the incriminating nature of the item must be immediately apparent. This means a law enforcement officer must have probable cause that the object in plain view is subject to seizure, such as contraband. See Dickerson, 508 U.S. at 375 (“If ... the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object – i.e., if ‘its incriminating character is not immediately apparent’ – the plain-view doctrine cannot justify its seizure”). As noted by the Court: “Regardless of whether the officer detects the contraband by sight or by touch ... the Fourth Amendment’s requirement that the officer have probable cause to believe that the item is contraband before seizing it ensures against excessively speculative seizures.” Id. at 376 (footnote omitted).
- 3) **The Third Element of the “Plain Touch” Doctrine is that it is Limited to the Initial Touch.** Finally, the “plain touch” doctrine is limited to the initial touch of the item by the law enforcement officer. In Dickerson, *supra*, the officer determined that the lump found in the defendant’s pocket was contraband only after “squeezing, sliding and otherwise manipulating the contents of the defendant’s pocket.” Id. at 378. The Court found this type of manipulation unlawful: “Here, the officer’s continued exploration of [Dickerson’s] pocket after having concluded that it contained no weapon was unrelated to ‘the sole justification of the search [under Terry:] ... the protection of the police officer and others nearby.’ It therefore amounted to the sort of evidentiary search that Terry expressly refused to authorize, and that we have condemned in subsequent cases.” Id. (emphasis added; internal citations omitted). Thus, “the police officer ... overstepped the bounds of the ‘strictly circumscribed’ search for weapons allowed under Terry.” Id.

NOTE: The Third Circuit has rephrased this rule in a useful fashion, holding that an officer conducting a lawful frisk is allowed to slide or manipulate an object in a suspect's pocket, consistent with a routine frisk, until the officer is able to reasonably eliminate the possibility that the object is a weapon. "The proper question. . . is not the immediacy and certainty with which an officer knows an object to be contraband or the amount of manipulation required to acquire that knowledge, but rather what the officer believes the object is by the time he concludes that it is not a weapon." United States v. Yamba, 506 F.3d 251, 259 (3rd Cir. 2007). See also United States v. Mattarolo, 209 F.3d 1153, 1158 (9th Cir. 2000) ("Had the officer continued to manipulate the object beyond what was necessary to ascertain that it posed no threat, he would have run afoul of the Supreme Court's holding in *Minnesota v. Dickerson*."); and United States v. Rogers, 129 F.3d 76, 79 (2nd. Cir. 1997).

- i. **Frisking the Companion of an Arrestee (The Automatic Companion Rule).** Some, but not all, federal courts have adopted the "automatic companion" rule, which grants a law enforcement officer the authority to lawfully conduct a "frisk" for weapons on any person who is accompanying an arrestee at the time of the arrest. "The Supreme Court has never directly addressed the applicability of the Terry exception to a search of the companion of an arrestee." United States v. Flett, 806 F.2d 823, 826 (8th Cir. 1986). While some guidance on this issue may be found in select Supreme Court decisions, such as Terry and Ybarra v. Illinois, 444 U.S. 85 (1979), a lack of clear direction has resulted in a split among the United States Circuit Courts of Appeal over the constitutionality of the "automatic companion" rule.

- 1) **Three Circuits Have Adopted the Automatic Companion Rule.** Currently, three circuits (the Fourth, Seventh, and Ninth) have adopted a bright-line rule allowing law enforcement officers to “frisk” the companion of an arrestee. See United States v. Berryhill, 445 F.2d 1189, 1193 (9th Cir. 1971)(“All companions of an arrestee within the immediate vicinity, capable of accomplishing a harmful assault on the officer, are constitutionally subjected to the cursory ‘pat-down’ reasonably necessary to give assurance that they are unarmed”); United States v. Poms, 484 F.2d 919 (4th Cir. 1973)(per curiam)(Same); United States v. Simmons, 567 F.2d 314 (7th Cir. 1977)(same).
 - 2) **Two Circuits Have Expressly Rejected the Automatic Companion Rule.** Two circuits (the Sixth and Eighth) have rejected the “automatic companion” rule, expressing serious reservations about the rule’s constitutionality, based upon the Supreme Court’s rulings in both Terry and Ybarra regarding individualized “reasonable suspicion.” In United States v. Bell, 762 F.2d 495 (6th Cir.), cert. denied, 474 U.S. 853 (1985), the Sixth Circuit refused the government’s invitation to adopt the “automatic companion” rule, noting “serious reservations about the constitutionality of such a result under existing precedent.” Id. at 498. The Sixth Circuit again rejected the “automatic companion” rule in United States v. Wilson, 506 F.3d 488, 494 (6th Cir. 2007), holding that the Terry requirement of reasonable suspicion has not been “eroded to the point that an individual may be frisked based upon nothing more than an unfortunate choice of associates.” (internal quotes and citation omitted). Similarly, in United States v. Flett, 806 F.2d 823 (8th Cir. 1986), the Eighth Circuit refused to adopt the “automatic companion” rule, citing both Terry and Ybarra in support of its decision. In each of these cases, the courts emphasized that, while the single fact of companionship does not, standing alone, justify a frisk, “it is not irrelevant to the mix that should be considered in determining whether the agent’s actions were justified.” Bell, 762 F.2d at 500. See *also* Flett, 806 F.2d at 827; Wilson, 506 F.3d at 494.
- j. **Vehicles - Investigative Stops and Terry Frisks.** “The Fourth Amendment applies to seizures of the person, including brief investigatory stops such as the stop of [a] vehicle.” United States v. Cortez, 449 U.S. 411, 417 (1981). “Stopping an automobile and detaining its occupants constitutes a ‘seizure’ within the meaning of [the Fourth Amendment, even though the purpose of the stop is limited and the resulting detention quite brief.” Delaware v. Prouse, 440 U.S. 648, 653 (1979). As with any other type of “seizure,” “[a]n automobile stop is subject to the Fourth Amendment imperative that the stop must be reasonable.” United States v. Ramos-Caraballo, 375 F.3d 797, 800 (8th Cir. 2004).

- 1) **Vehicle Stops Are Analogous to Investigative Detentions.**
"Because a routine traffic stop is only a limited form of seizure, it is more analogous to an investigative detention than a custodial arrest." United States v. Purcell, 236 F.3d 1274, 1277 (11th Cir.), cert. denied, 534 U.S. 830 (2001). See Berkemer v. McCarty, 468 U.S. 420, 439 (1984)("The usual traffic stop is more analogous to a so-called 'Terry stop,' than to a formal arrest")(internal citation and footnote omitted); United States v. Rosborough, 366 F.3d 1145, 1150 (10th Cir. 2004)(Noting that "investigative detentions arising out of routine traffic stops are analyzed under the framework of Terry and its progeny"); United States v. Garrido-Santana, 360 F.3d 565, 570-71 (6th Cir. 2004)("A traffic stop is reasonable under the Fourth Amendment where the stop was both proper at its inception and 'reasonably related in scope to the circumstances ... [that] justified the ... [stop] in the first place')(citation omitted).
- 2) **Driver and Passengers are "Seized" During a Traffic Stop.**
When police stop a vehicle, both the driver and any passengers are effectively seized, giving passengers the right to challenge the legality of the stop and the admissibility of evidence discovered as a result. Brendlin v. California, 127 S.Ct. 2400 (2007).
- 3) **Reasonable Suspicion is Required to Conduct a Vehicle Stop.**
A law enforcement officer may conduct a traffic stop or other investigative stop of a vehicle if the officer has, at a minimum, reasonable suspicion that "the person stopped is, or is about to be, engaged in criminal activity." Cortez, 449 U.S. at 417.
 - a) **Observed Traffic Violations May Form the Basis For the Stop.** For example, "a traffic stop is valid under the Fourth Amendment if the stop is based on an observed traffic violation." Manjarrez, 348 F.3d at 884. See also United States v. Serena, 368 F.3d 1037, 1040 (8th Cir. 2004)(Traffic stop permitted where officer reasonably believed tags on vehicle were expired); United States v. Williams, 359 F.3d 1019, 1021 (8th Cir. 2004) (Officer had probable cause for stop based upon stop-sign violation); Bonner, 363 F.3d at 216 ("A police officer who observes a violation of state traffic laws may lawfully stop the car committing the violation").

NOTE: All states have statutes that prohibit moving in and out of traffic lanes in an unsafe manner. See, e.g., S.D. Codified Laws 32-26-6 (“On a roadway divided into lanes, a vehicle shall be driven as nearly as practicable entirely within a single lane and may not be moved from such lane until the driver has first ascertained that such movement can be made with safety”). One source of conflict between the Federal circuit courts of appeals concerns whether a single, isolated incident of crossing either the center or fog line is sufficient to establish a violation of these types of state statutes. In United States v. Martinez, 354 F.3d 932 (8th Cir. 2004), the Eighth Circuit Court of Appeals held an officer’s traffic stop was justified, even though he “observed no traffic violations other than [a] single fog-line crossing ...” Id. at 934. Alternatively, both the Sixth and Tenth Circuit Courts of Appeals have found that a single crossing of the line was insufficient to justify a violation of the sort of statute discussed above. See United States v. Freeman, 209 F.3d 464, 466 (6th Cir. 2000) (“We cannot, however, agree that one isolated incident of a large motor home partially weaving into the emergency lane for a few feet and in an instant in time constitutes a failure to keep the vehicle within a single lane ‘as nearly as practicable’”); United States v. Gregory, 79 F.3d 973, 978 (10th Cir. 1996) (Noting that, under certain conditions, “any vehicle could be subject to an isolated incident of moving into the right shoulder of the roadway, without giving rise to a suspicion of criminal activity”).

- b) **Reasonable Suspicion a Vehicle is Carrying Contraband Will Justify a Stop.** A traffic stop is also permissible in situations where reasonable suspicion exists to believe the vehicle is carrying contraband. See United States v. Singh, 363 F.3d 347, 355 (4th Cir. 2004)(Noting “it is elementary that the authorities are entitled to stop a moving vehicle reasonably suspected of involvement in smuggling contraband, and they may briefly detain and investigate such a vehicle and its occupants”).
- c) **Traffic Stops Are Permitted Where Reasonable Suspicion Exists to Believe a Driver or Occupant is Wanted For Past Criminal Conduct.** Similarly, “an officer may stop and question a person if there are reasonable grounds to believe that person is wanted for past criminal conduct.” Id. at 417 n.2. See also United States v. Botero-Ospina, 71 F.3d 783, 787 (10th Cir. 1995), cert. denied, 518 U.S. 1007 (1996)(Noting “a traffic stop is valid under the Fourth Amendment if the stop is based on an observed traffic violation or if the police officer has reasonable articulable suspicion that a traffic or equipment violation has occurred or is occurring”).
- 4) **Permissible Actions During Vehicle Stops.** The Supreme Court has long recognized the very real dangers faced by law enforcement officers who confront suspects located in vehicles. See Michigan v. Long, 463 U.S. 1032, 1048 (1983)(Noting “danger presented to police officers in ‘traffic stops’ and automobile situations”); Pennsylvania v. Mimms, 434 U.S. 106, 110 (1977)(Decision rested, in part, on the “inordinate risk confronting an officer as he approaches a person seated in an automobile”); Adams v. Williams, 407 U.S. 143, 148 n.3 (1972) (Citing a study indicating that “approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile”). For that reason, when law enforcement officers conduct vehicle stops, they may “take such steps as are reasonably necessary to protect their personal safety.” United States v. Hensley, 469 U.S. 221, 235 (1985). This would include, for example, “the authority and duty to control the vehicle and its occupants, at least for a brief period of time.” Bonner, 363 F.3d at 217. Some of the most common of those permissible actions are listed below.

- a) **The Driver May Be Removed From the Vehicle.** “Once a motor vehicle has been lawfully detained ... the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment’s proscription of unreasonable searches and seizures.” Pennsylvania v. Mimms, 434 U.S. 106, 111 n.6 (1977). This is true even in situations where the law enforcement officer has no reason to suspect “foul play.” Id. at 109.
- b) **The Passengers May Be Removed From the Vehicle.** In Maryland v. Wilson, 519 U.S. 408 (1997), the Supreme Court extended the holding of Mimms to those who are passengers in the vehicle: “We therefore hold that an officer making a traffic stop may order passengers to get out of the car pending completion of the stop.” Id. at 415.
- c) **The Passengers May Be Ordered to Remain in or Return to the Vehicle.** Of course a law enforcement officer may also order passengers to remain **inside** the vehicle during the stop. See Rogala v. District of Columbia, 161 F.3d 44, 53 (D.C. Cir. 1998) (“A police officer has the power to reasonably control the situation by requiring a passenger to remain in a vehicle during a traffic stop”); United States v. Moorefield, 111 F.3d 10, 13 (3d Cir. 1997) (“In view of the Supreme Court’s ruling in Wilson, we have no hesitancy in holding that the officers lawfully ordered Moorefield to remain in the car with his hands in the air”); United States v. Clark, 337 F.3d 1282, 1287-88 (11th Cir. 2003)(same). Similarly, an officer may order a passenger to re-enter the vehicle during the stop if the passenger gets out of the car. United States v. Sanders, 510 F.3d 788 (8th Cir. 2007).
- d) **A Flashlight May Be Used to Illuminate the Interior of a Vehicle.** A law enforcement officer may also use a flashlight to illuminate the darkened interior of a vehicle. See Texas v. Brown, 460 U.S. 730, 739-740 (1983) (plurality opinion) (“It is likewise beyond dispute that Maples’ action in shining his flashlight to illuminate the interior of Brown’s car trenchd upon no right secured to the latter by the Fourth Amendment Numerous other courts have agreed that the use of artificial means to illuminate a darkened area simply does not constitute a search, and thus triggers no Fourth Amendment protection”)(footnote omitted).

- e) **Where Windows Are Heavily Tinted, They May Be Opened to Check for Weapons.** "When, during already dangerous traffic stops, officers must approach vehicles whose occupants and interiors are blocked from view by tinted windows, the potential harm to which the officers are exposed increases exponentially...." United States v. Stanfield, 109 F.3d 976, 981 (4th Cir.), cert. denied, 522 U.S. 857 (1997). Accordingly, at least one court has held that "whenever, during a lawful traffic stop, officers are required to approach a vehicle with windows so heavily tinted that they are unable to view the interior of the stopped vehicle, they may, when it appears in their experienced judgment prudent to do so, open at least one of the vehicle's doors and, without crossing the plane of the vehicle, visually inspect its interior in order to ascertain whether the driver is armed, whether he has access to weapons, or whether there are other occupants of the vehicle who might pose a danger to the officers." Id.
- f) **Where a Passenger is Unable to Exit the Vehicle, Officers May Open The Door to Inspect the Occupant.** After ordering an occupant to exit a vehicle and hearing that he claims to be physically unable to do so, an officer may open the occupant's door and conduct a minimally necessary visual inspection of the occupant. If the inspection reveals articulable facts constituting reasonable suspicion that the occupant is armed and dangerous, he may be patted down to the same extent as he could have been if he had complied with the order to exit the vehicle. United States v. Meredith, 480 F.3d 366 (5th Cir. 2007).

- g) **License and Registration Checks May Be Conducted.** Once an individual has been lawfully detained during a traffic stop, a law enforcement officer may investigate the driver's license and vehicle registration, seek consent to search the vehicle, and run a computer check for outstanding warrants. *See, e.g., Singh*, 363 F.3d at 357 ("Where reasonable suspicion exists to support the stop of a moving vehicle, officers are entitled to conduct an investigatory detention to obtain consent to search or to develop probable cause"); *United States v. Simmons*, 172 F.3d 775, 778 (11th Cir. 1999)("Once the police had validly detained Simmons, plainly they were entitled under the decisional law to conduct a variety of checks on the driver and his car, including questioning the driver about the traffic violation, requesting consent to search the car, and running a computer check for outstanding warrants"); *United States v. Allegree*, 175 F.3d 648, 650 (8th Cir.), *cert. denied*, 528 U.S. 958 (1999)("A reasonable investigation following a justifiable traffic stop may include asking for the driver's license and registration, asking the driver to sit in the patrol car, and asking about the driver's destination and purpose"); *United States v. Dexter*, 165 F.3d 1120, 1126 (7th Cir. 1999)("[W]hen a vehicle is pulled over, an officer may ask for a driver's license and registration as a routine matter"); *United States v. Mendez*, 118 F.3d 1426, 1429 (10th Cir. 1997)("An officer conducting a routine traffic stop may run computer checks on the driver's license, the vehicle registration papers, and on whether the driver has any outstanding warrants or the vehicle has been reported stolen").

NOTE: “When a law enforcement officer is investigating a traffic violation or an accident, and the driver is unwilling or unable to produce the registration of the vehicle involved to the officer upon demand, it is reasonable for the officer to conduct a limited search for the registration in those areas where the registration would likely be located.” United States v. Kelly, 267 F. Supp. 2d 5, 14 (D.D.C. 2003). See also 3 W. LaFave, *Search and Seizure* § 7.4(d), p. 566 (3d ed. 1996) (“Under a variety of circumstances, it is reasonable for the police to make a limited search of a vehicle in an effort to determine ownership”); Quezada v. Hubbard, 2002 U.S. Dist. LEXIS 13162, at *8 (D. Cal. 2002) (Where driver “did not produce his driver’s license or other identification, and the registration offered by the passenger could not be verified,” officer’s search of driver’s seat armrest, “which [was] a likely place for storage of a license and registration,” was permissible); State v. Jones, 478 A.2d 424, 426 (N.J. Super. Ct. App. Div. 1984) (Noting that, “where there has been a traffic violation and the operator of the motor vehicle is unable to produce proof of registration, a police officer may search the car for evidence of ownership”); State v. Taras, 504 P.2d 548, 552 (Ariz. Ct. App. 1972) (“Thus, we conclude that if a driver is unable to produce proof of registration, the officer may conduct a limited search of the car for evidence of automobile ownership”). These same principles would also apply to situations where a search is being conducted for ownership information regarding an abandoned vehicle. See, e.g., Kelly, 267 F. Supp. 2d at 13 (Noting that “a police officer who encounters an abandoned car on a public highway may search the vehicle for the registration”); Muegel v. State, 272 N.E. 2d 617, 620 (Ind. 1971) (Same).

- h) **Requests for Passengers' Identification.** Just as an officer may ask for the identification of the driver of a lawfully stopped vehicle, so he may request identification of the passengers also lawfully stopped. No separate showing is required. When an officer lawfully stops a vehicle, the identity of the persons in whose company the officer suddenly finds himself may be pertinent to the officer's well-being. United States v. Soriano-Jarquín, 492 F.3d 495 (4th Cir. 2007) (Eighth and Eleventh Circuits agree).
- i) **Questions Regarding Travel Plans May Be Asked.** "Questions about travel plans are routine and 'may be asked as a matter of course without exceeding the proper scope of a traffic stop.'" United States v. West, 219 F.3d 1171, 1176 (10th Cir. 2000). See also United States v. Hill, 195 F.3d 258, 268 (6th Cir. 1999), cert. denied, 528 U.S. 1176 (2000) (Officer's questions to suspect about his moving plans were reasonable, "in that the questions related to [the suspect's] purpose for traveling"); United States v. \$ 404,905.00, 182 F.3d 643, 647 (8th Cir. 1999) (During lawful stop, "the officer may ask the motorist routine questions such as his destination, the purpose of the trip, or whether the officer may search the vehicle, and he may act on whatever information is volunteered"). "Travel plans typically are related to the purpose of a traffic stop because the motorist is traveling at the time of the stop. For example, a motorist's travel history and travel plans may help explain, or put into context, why the motorist was weaving (if tired) or speeding (if there was an urgency to the travel)." United States v. Holt, 264 F.3d 1215, 1221 (10th Cir. 2001).
- j) **Questions Unrelated to the Purpose of the Traffic Stop May Be Asked If They Do Not Prolong the Stop.** An officer need not have separate reasonable suspicion or probable cause to ask questions unrelated to the reason for the traffic stop, so long as the questioning does not prolong the stop. United States v. Mendez, 476 F.3d 1077 (9th Cir. 2007), citing Muehler v. Mena, 544 U.S. 93 (2005).

k) **A Law Enforcement Officer is Not Required to Notify a Suspect He is Free to Leave Before Seeking Consent to Search.** As noted above, once a vehicle has been lawfully stopped, officers are lawfully entitled to request consent to search the vehicle. See Simmons, 172 F.3d at 778. Additionally, a law enforcement officer who has lawfully detained a suspect during a vehicle stop is not required to inform the suspect that he or she is free to leave before obtaining a valid consent to search. Ohio v. Robinette, 519 U.S. 33, 40 (1996)

5) **Terry Frisks of Vehicles.** In Michigan v. Long, 463 U.S. 1032 (1983), the Supreme Court expanded the scope of a Terry frisk to include vehicles. See United States v. Wallen, 388 F.3d 161, 165 (5th Cir. 2004) ("The Supreme Court determined that protective pat-down/frisk searches authorized by Terry v. Ohio extend to ... automobiles...."). Accordingly, a law enforcement officer "may pat down the occupants of [a] vehicle and conduct a search of the passenger compartment, if he has reasonable suspicion that the occupants might be armed and dangerous." Bonner, 363 F.3d at 216. Compare United States v. Baker, 47 F.3d 691, 695 (5th Cir.), cert. denied, 515 U.S. 1168 (1995)(Upholding protective automobile search based on existence of hunting knife, ammunition, and occupant's general statement that she "did not know" the location of a pistol), with Estep v. Dallas County, 310 F.3d 353, 358 (5th Cir. 2002)(Holding that camouflage gear, National Rifle Association sticker, key-chain mace, and an unusual tone of voice on the part of the passenger did not justify protective automobile search).

NOTE: There is often confusion on the part of students regarding the difference between “frisking” a vehicle during a Terry stop and “searching” the vehicle incident to the arrest of an occupant. At least one Federal circuit court of appeal has suggested that the “Supreme Court in Long defined the scope of a permissible protective search by borrowing the standard for vehicle searches incident to arrest established in New York v. Belton, 453 U.S. 454 (1981).” United States v. Arnold, 388 F.3d 237, 239 (7th Cir. 2004). Accordingly, the Seventh Circuit Court of Appeals has found that “the difference between a search under Belton and one under Long is simply the rationale for conducting it, not its physical boundaries.” Id. at *7. Of course, “[a]lthough the general search area covered by Belton and Long is the same, the limited rationale for permitting a search under Long - safety concerns - constrains an officer to search only the locations that may contain a weapon and to which the motorist may have access.” Id. (citation omitted). “Hence, assuming that an officer limits his search to those areas, the boundaries of the passenger compartment under Belton apply equally to the scope of a search under Long.” Id.

- a) **The Passenger Compartment May Be “Frisked.”** In sum, if reasonable suspicion exists to believe that the driver or passenger in a vehicle is dangerous and may gain immediate control of a weapon, a law enforcement officer may “frisk” that person, as well as the entire passenger compartment of the vehicle. Id. at 1049; United States v. Cook, 277 F.3d 82, 85 (1st Cir. 2002) (Where law enforcement officer “has a reasonable basis to suspect that the subject of his inquiry may be armed, he also may frisk the suspect and undertake a limited search of the passenger compartment of any vehicle in which he is sitting”).

- b) **Containers Located Inside the Passenger Compartment May Be Frisked.** A “frisk” of a vehicle under Long may include any unlocked containers located in the passenger compartment. See, e.g., Holmes, 376 F.3d at 280-81 (Holding that Long allowed frisk of entire passenger compartment of vehicle where weapons could be found, including “containers’ like the center console and glove compartment”). Additionally, some courts have extended this rule to include locked containers, such as a locked glove compartment. See, e.g., United States v. Palmer, 360 F.3d 1243, (10th Cir. 2004)(Protective search of locked glove box permissible based on danger suspect may break away to obtain weapon); United States v. Holifield, 956 F.2d 665, 668-69 (7th Cir. 1992)(Frisk of locked glove box permissible in that “[o]nce the occupants reentered the vehicle, it would have taken only a few seconds for Holifield or one of the passengers to remove the keys from the ignition and unlock the glove compartment, thus giving them immediate access to the pistol”); United States v. Brown, 913 F.2d 570, 571-72 (8th Cir.), cert. denied, 498 U.S. 1016 (1990)(Upholding search of locked glove compartment where key was “lying on car’s front seat”).
- c) **The Trunk May Not Be “Frisked.”** However, a law enforcement officer may not “frisk” the trunk of the vehicle. See Arnold, 388 F.3d at 240 (“An officer armed solely with reasonable suspicion may not search the trunk of a vehicle when the motorist would not have been able to reach a weapon located there ...”); United States v. Brown, 334 F.3d 1161, 1170 (D.C. Cir. 2003) (Noting that Terry frisks “are limited to areas immediately accessible to the suspect,” specifically, “the passenger compartment of the car”); United States v. Wimbush, 337 F.3d 947, 950 (7th Cir.), cert. denied, ___ U.S. ___, 124 S. Ct. 848 (2003)(“Officers may conduct a protective search of a vehicle’s passenger compartment when they have a reasonable belief that the suspect poses a danger and that their safety may be threatened by the possible presence of weapons”).

NOTE: Many newer model vehicles allow a driver or passenger to access the trunk through the interior of the vehicle, primarily through a fold-down back seat or armrest. The only court to have addressed the situation to date has found that, in situations where “the trunk [is] generally accessible from the passenger compartment,” perhaps through a fold-down back seat, the seat may be lowered and the trunk may be “frisked” by a law enforcement officer. Arnold, 388 F.3d at 240.

- 6) **Duration of Vehicle Stops.** As with a traditional investigative stop, an investigative detention that occurs in a vehicle “must be temporary and last no longer than is necessary to effectuate the purpose of the stop.” Florida v. Royer, 460 U.S. 491, 500 (1983). “Ordinarily, when a citation or warning has been issued and all record checks have been completed and come back clean, the legitimate investigative purpose of the traffic stop is fulfilled, and the driver’s license and other documents should be returned.” United States v. Simms, 385 F.3d 1347, 1353 (11th Cir. 2004). *See also* United States v. Fuse, 391 F.3d 924, 927 (8th Cir. 2004) (“Once the officer decides to let a routine traffic offender depart with a ticket, a warning or an all clear—a point in time determined, like other Fourth Amendment inquiries, by objective indicia of the officer’s intent—then the Fourth Amendment applies to limit any subsequent detention or search”). “If a traffic stop is unjustifiably prolonged past the point when a driver’s documents should have been returned, it may be found to have ended at the point when the documents should have been returned, and not when they were actually returned.” Simms, 385 F.3d at 1353.
- 7) **Extending the Questioning Beyond That Related to the Initial Stop.** Generally, “questioning that prolongs the detention, yet cannot be justified by the purpose of such an investigatory stop, is unreasonable under the Fourth Amendment.” United States v. Childs, 277 F.3d 947, 952 (7th Cir.), *cert. denied*, 537 U.S. 829 (2002). *See also* Garrido-Santana, 360 F.3d at 574 (Noting “[t]he circuit courts generally agree that the Fourth Amendment requires that, absent some additional justification, any questioning during a valid traffic stop must not prolong the detention necessary to complete the initial purpose of that stop”). Nevertheless, “[l]engthening the detention for further questioning beyond that related to the initial stop is permissible in two circumstances.

- a) **Extending the Stop Based Upon Reasonable Suspicion.**
“First, the officer may detain the driver for questioning unrelated to the initial stop if he has an objectively reasonable and articulable suspicion illegal activity has occurred or is occurring.” United States v. Hunnicutt, 135 F.3d 1345, 1349 (10th Cir. 1998). *See also* United States v. Barragan, 379 F.3d 524, 529 (8th Cir. 2004)(“If the responses of the detainee and the circumstances give rise to suspicions unrelated to the traffic offense, an officer may broaden his inquiry and satisfy those suspicions”); United States v. Wood, 106 F.3d 942, 946 (10th Cir. 1997)(“The scope and duration of a traffic stop may be expanded beyond its initial purpose if, and only if, the police officer has ‘a particularized and objective basis for suspecting the particular person stopped of criminal activity’”); Holt, 264 F.3d at 1221 (“Further delay is justified only if the officer has reasonable suspicion of illegal activity ...”); United States v. Grant, 349 F.3d 192, 196 (5th Cir. 2003)(“Once an officer’s suspicions have been verified or dispelled, the detention must end unless there is additional articulable, reasonable suspicion”); United States v. Townsend, 305 F.3d 537, 541 (6th Cir. 2002) (“To detain the motorist any longer than is reasonably necessary to issue the traffic citation ... the officer must have reasonable suspicion that the individual has engaged in more extensive criminal conduct”); United States v. Gregory, 302 F.3d 805, 809 (8th Cir. 2002)(“If the responses of the detainee and the circumstances give rise to suspicions unrelated to the traffic offense, an officer may broaden his inquiry and satisfy those suspicions”) (citation omitted); United States v. Pruitt, 174 F.3d 1215, 1219 (11th Cir. 1999)(Noting “once an officer has briefly stopped a motor vehicle operator for the purpose of issuing a traffic violation (i.e., a ticket), the officer’s continuing detention of the vehicle’s occupants is authorized under the Fourth Amendment only if the officer can point to “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion”).

NOTE: In Hunnicut, *supra*, the court listed a number of factors that “may contribute to the formation of an objectively reasonable suspicion of illegal activity” distinct from the original purpose of the stop. *Id.* at 1349. Among those factors that have justified further questioning are: (1) having no proof of ownership of the vehicle; (2) having no proof of authority to operate the vehicle; (3) inconsistent statements about destination; (4) driving with a suspended licence; and (5) a reluctance to stop. *Id.* Other courts have identified additional factors to lengthen a traffic stop, such as incriminating statements made by the occupants during the stop, Grant, 349 F.3d at 197, and lying about travel plans, Townsend, 305 F.3d at 543.

- b) **Extending the Stop Based Upon the Consent of the Suspect.** ... “[F]urther questioning unrelated to the initial stop is [also] permissible if the initial detention has become a consensual encounter.” Hunnicut, 135 F.3d at 1349. A vehicle stop “generally ends when the officer returns the driver’s license, registration, and insurance information.” Manjarrez, 348 F.3d at 885. And, “[i]n several cases ... [courts] have acknowledged that a lawful traffic stop can devolve into a consensual encounter.” United States v. Sanchez-Pena, 336 F.3d 431, 442 (5th Cir. 2003). For example, “[i]f the driver voluntarily consents to additional questioning, he is no longer seized for purposes of the Fourth Amendment because he is free to leave.” United States v. Taverna, 348 F.3d 873, 878 (10th Cir. 2003). *See, e.g., United States v. Lattimore*, 87 F.3d 647, 653 (4th Cir. 1996) (Where citation had been issued and license returned, “totality of the circumstances presented indicate[d] ... from this point forward the encounter was consensual”); United States v. White, 81 F.3d 775, 778 (8th Cir.), *cert. denied*, 519 U.S. 1011 (1996) (Noting that, after the suspect’s “license and registration were returned and the warning was issued, the encounter became nothing more than a consensual encounter between a private citizen and a law enforcement officer”).

- k. **Pretextual Traffic Stops are Permissible.** "A pretextual stop occurs when the police use a legal justification to make a stop in order to search a person or his vehicle, or interrogate him, for an unrelated and more serious crime for which they do not have the reasonable suspicion necessary to support a stop." United States v. Morales-Zamora, 974 F.2d 149, 152 (10th Cir. 1992). In Whren v. United States, 517 U.S. 806, 813 (1996), the Supreme Court upheld pretextual traffic stops, noting that the constitutionality of a traffic stop does not depend "on the actual motivations of the individual officers involved." Thus, "an officer may stop a vehicle for a traffic violation when his true motivation is to search for contraband, as long as the officer had probable cause to initially stop the vehicle." United States v. Hill, 195 F.3d 258, 264 (6th Cir. 1999), cert. denied, 528 U.S. 1176 (2000). See also Garrido-Santana, 360 F.3d at 571 (Noting that, "as long as a police officer has probable cause to believe that a motorist committed a traffic violation, the resulting traffic stop is generally reasonable under the Fourth Amendment regardless of the officer's subjective intent or state of mind in conducting the traffic stop"); Draper v. Reynolds, 369 F.3d 1270, 1275 (11th Cir. 2004)(Noting that "ulterior motives will not invalidate police conduct based on probable cause to believe a violation of the law occurred").

D. EPO #4: IDENTIFY WHEN LAW ENFORCEMENT OFFICERS MAY OR MAY NOT USE RACE TO JUSTIFY STOPS OR ARRESTS IN ACCORDANCE WITH DEPARTMENT OF JUSTICE GUIDELINES

1. **The Use of Racial Profiling By Law Enforcement Officers - DOJ Guidelines.** The use of race as a factor utilized by law enforcement officers in the performance of their duties gives rise to numerous Constitutional concerns. In light of these concerns, the Department of Justice (DOJ) published in June of 2003 a document entitled "Guidance Regarding the Use of Race By Federal Law Enforcement Agencies." On June 1, 2004, the Department of Homeland Security (DHS) explicitly adopted the DOJ policy on racial profiling. See DHS Racial Profiling Policy. The following excerpts are taken directly from that document, and provide the standard that will be taught by the FLETC Legal Division. The guidance itself is attached to this lesson plan and contains clarifying information and additional examples that may be helpful in presenting this material.

NOTE: On June 1, 2004, the Secretary of the Department of Homeland Security issued a policy statement on racial profiling. This statement provides as follows: "Racial profiling concerns the invidious use of race or ethnicity as a criterion in conducting stops, searches and other law enforcement activities. It is premised on the erroneous assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity. DHS explicitly adopts the Department of Justice's 'Guidance Regarding the Use of Race By Federal Law Enforcement Agencies,' issued in June 2003. It is the policy of the Department of Homeland Security to prohibit the consideration of race or ethnicity in our daily law enforcement activities in all but the most exceptional circumstances, as defined in the DOJ Guidance. DHS personnel may use race or ethnicity only when a compelling governmental interest is present. Rather than relying on race or ethnicity, it is permissible and indeed advisable to consider an individual's connections to countries that are associated with significant terrorist activity. Of course, race- or ethnicity-based information that is specific to particular suspects or incidents, or ongoing criminal activities, schemes or enterprises, may be considered, as stated in the DOJ Guidance."

- a. **The Constitutional Framework.** “[T]he Constitution prohibits selective enforcement of the law based on considerations such as race.” Whren v. United States, 517 U.S. 806, 813 (1996). Thus, for example, the decision of federal prosecutors “whether to prosecute may not be based on ‘an unjustifiable standard such as race, religion, or other arbitrary classification.’” United States v. Armstrong, 517 U.S. 456, 464 (1996)[*quoting Oyler v. Boles*, 368 U.S. 448, 456 (1969)]. The same is true of Federal law enforcement officers. Federal courts repeatedly have held that any general policy of “utiliz[ing] impermissible racial classifications in determining whom to stop, detain, and search” would violate the Equal Protection Clause. Chavez v. Illinois State Police, 251 F.3d 612, 635 (7th Cir. 2001). As the Sixth Circuit has explained, “[i]f law enforcement adopts a policy, employs a practice, or in a given situation takes steps to initiate an investigation of a citizen based solely upon that citizen’s race, without more, then a violation of the Equal Protection Clause has occurred.” United States v. Avery, 137 F.3d 343, 355 (6th Cir. 1997). “A person cannot become the target of a police investigation solely on the basis of skin color. Such selective law enforcement is forbidden.” *Id.* at 354. As the Supreme Court has held, this constitutional prohibition against selective enforcement of the law based on race “draw[s] on ‘ordinary equal protection standards.’” Armstrong, 517 U.S. at 465 [*quoting Wayte v. United States*, 470 U.S. 598, 608 (1985)]. Thus, impermissible selective enforcement based on race occurs when the challenged policy has “a discriminatory effect and ... was motivated by a discriminatory purpose.” *Id.* (*quoting Wayte*, 470 U.S. at 608). Put simply, “to the extent that race is used as a proxy” for criminality, “a racial stereotype requiring strict scrutiny is in operation.” *Cf. Bush v. Vera*, 517 U.S. 952, 968 (1996)(plurality).
- b. **Guidance for Federal Officials Engaged in Law Enforcement Activities**
- 1) **Routine or Spontaneous Activities in Domestic Law Enforcement.** In making routine or spontaneous law enforcement decisions, such as ordinary traffic stops, Federal law enforcement officers may not use race or ethnicity to any degree, except that officers may rely on race and ethnicity in a specific suspect description. This prohibition applies even where the use of race or ethnicity might otherwise be lawful.
 - 2) **Law Enforcement Activities Related to Specific Investigations.** In conducting activities in connection with a specific investigation, Federal law enforcement officers may consider race and ethnicity only to the extent that there is trustworthy information, relevant to the locality or time frame, that links persons of a particular race or ethnicity to an identified criminal incident, scheme, or organization. This standard applies even where the use of race or ethnicity might otherwise be lawful.

- a) **Authorities May Never Rely on Generalized Stereotypes, But May Rely Only on Specific Race- or Ethnicity-Based Information.** Reliance upon generalized stereotypes is absolutely forbidden. Rather, use of race or ethnicity is permitted only when the officer is pursuing a specific lead concerning the identifying characteristics of persons involved in an *identified* criminal activity. The rationale underlying this concept carefully limits its reach. In order to qualify as a legitimate investigative lead, the following must be true:

- (1) The information must be relevant to the locality or time frame of the criminal activity;
- (2) The information must be trustworthy;
- (3) The information concerning identifying characteristics must be tied to the particular criminal incident, a particular criminal scheme, or a particular criminal organization.

This bar extends to the use of race-neutral pretexts as an excuse to target minorities. Federal law enforcement may not use such pretexts. This prohibition extends to the use of other, facially race-neutral factors as a proxy for overtly targeting persons of a certain race or ethnicity. This concern arises most frequently when aggressive law enforcement efforts are focused on "high crime areas." The issue is ultimately one of motivation and evidence; certain seemingly race-based efforts, if properly supported by reliable, empirical data, are in fact race-neutral.

- b) **The Information Must be Relevant to the Locality or Time Frame.** Any information concerning the race of persons who may be involved in specific criminal activities must be locally or temporally relevant.
- c) **The Information Must Be Trustworthy.** Where the information concerning potential criminal activity is unreliable or is too generalized and unspecific, use of racial descriptions is prohibited.

d) **Race- or Ethnicity-Based Information Must Always be Specific to Particular Suspects or Incidents, or Ongoing Criminal Activities, Schemes, or Enterprises.** These standards contemplate the appropriate use of both "suspect-specific" and "incident-specific" information. As noted above, where a crime has occurred and authorities have eyewitness accounts including the race, ethnicity, or other distinguishing characteristics of the perpetrator, that information may be used. Federal authorities may also use reliable, locally relevant information linking persons of a certain race or ethnicity to a particular incident, unlawful scheme, or ongoing criminal enterprise - even absent a description of any particular individual suspect. In certain cases, the circumstances surrounding an incident or ongoing criminal activity will point strongly to a perpetrator of a certain race, even though authorities lack an eyewitness account. It is critical, however, that there be reliable information that ties persons of a particular description to a specific criminal incident, ongoing criminal activity, or particular criminal organization. Otherwise, any use of race runs the risk of descending into reliance upon prohibited generalized stereotypes. Note that these standards allow the use of reliable identifying information about planned future crimes. Where federal authorities receive a credible tip from a reliable informant regarding a planned crime that has not yet occurred, authorities may use this information under the same restrictions applying to information obtained regarding a past incident. A prohibition on the use of reliable prospective information would severely hamper law enforcement efforts by essentially compelling authorities to wait for crimes to occur, instead of taking pro-active measures to prevent crimes from happening.

c. **Guidance for Federal Officials Engaged in Law Enforcement Activities Involving Threats to National Security or the Integrity of the Nation's Borders**

1) **Threats to National Security or Catastrophic Events.** In investigating or preventing threats to national security or other catastrophic events (including the performance of duties related to air transportation security), or in enforcing laws protecting the integrity of the Nation's borders, Federal law enforcement officers may not consider race or ethnicity except to the extent permitted by the Constitution and laws of the United States.

- 2) **Compelling Governmental Interest.** Since the terrorist attacks on September 11, 2001, the President has emphasized that federal law enforcement personnel must use every legitimate tool to prevent future attacks, protect our Nation's borders, and deter those who would cause devastating harm to our Nation and its people through the use of biological or chemical weapons, other weapons of mass destruction, suicide hijackings, or any other means. "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." Haig v. Agee, 453 U.S. 280, 307 (1981)[*quoting* Aptheker v. Secretary of State, 378 U.S. 500, 509 (1964)].

- 3) **Exceptional Circumstances Required.** The Constitution prohibits consideration of race or ethnicity in law enforcement decisions in all but the most exceptional instances. Given the incalculably high stakes involved in such investigations, however, Federal law enforcement officers who are protecting national security or preventing catastrophic events (as well as airport security screeners) may consider race, ethnicity, and other relevant factors to the extent permitted by our laws and the Constitution. Similarly, because enforcement of the laws protecting the Nation's borders may necessarily involve a consideration of a person's alienage in certain circumstances, the use of race or ethnicity in such circumstances is properly governed by existing statutory and constitutional standards. See, e.g., United States v. Brignoni-Ponce, 422 U.S. 873, 886-87 (1975). This policy will honor the rule of law and promote vigorous protection of our national security. As the Supreme Court has stated, all racial classifications by a governmental actor are subject to the "strictest judicial scrutiny." Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 224-25 (1995). The application of strict scrutiny is of necessity a fact-intensive process. *Id.* at 236. Thus, the legality of particular, race-sensitive actions taken by Federal law enforcement officials in the context of national security and border integrity will depend to a large extent on the circumstances at hand. In absolutely no event, however, may Federal officials assert a national security or border integrity rationale as a mere pretext for invidious discrimination. Indeed, the very purpose of the strict scrutiny test is to "smoke out" illegitimate use of race, Adarand, 515 U.S. at 226 [*quoting* Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)], and law enforcement strategies not actually premised on *bona fide* national security or border integrity interests therefore will not stand. In sum, constitutional provisions limiting government action on the basis of race are wide-ranging and provide substantial protections at every step of the investigative and judicial process. Accordingly ... when addressing matters of national security, border integrity, or the possible catastrophic loss of life, existing legal and constitutional standards are an appropriate guide for Federal law enforcement officers.

NOTE: As noted above, federal law enforcement officers who are protecting national security or preventing catastrophic events (as well as airport security screeners) may consider race, ethnicity, and other relevant factors “to the extent permitted by our laws and the Constitution.” Accordingly, the following section deals with the law (as opposed to the DOJ Guidance) on the use of race during law enforcement investigations regarding the protection of national security or prevention of catastrophic events.

2. **The Use of Racial Profiling By Law Enforcement Officers - Constitutional and Federal Law.** The use of race as a factor utilized by law enforcement officers in the performance of their duties gives rise to numerous Constitutional concerns. The following discussion concerns the use of race in what is referred to as the “pre-contact” stage. The “pre-contact” stage occurs “prior to the consensual encounter, when officers decide to ‘target’ someone for surveillance.” Avery, 137 F.3d at 353.
- a. **Race as the Sole Factor During Pre-Contact Stage.** In sum, “a person cannot become the target of a police investigation solely on the basis of skin color.” Id. at 354. “Although Fourth Amendment principles regarding unreasonable seizures do not apply to consensual encounters, an officer does not have unfettered discretion to conduct an investigatory interview with a citizen. The Equal Protection Clause of the Fourteenth Amendment provides citizens a degree of protection independent of the Fourth Amendment protection against unreasonable searches and seizures. This protection becomes relevant even before a seizure occurs.” Id. at 352. So, for example, a “factually supported record of the selection for interview because of race, a general practice or pattern that primarily targeted minorities for consensual interviews, or a racial component in the drug courier profile would have given rise to due process and equal protection constitutional implications cognizable by” a federal court. United States v. Taylor, 956 F.2d 572, 578 (6th Cir.), cert. denied, 506 U.S. 952 (1992).

- b. **Race as One Factor Among Others During Pre-Contact Stage.** “In some instances, officers may decide to interview a suspect for many reasons, some of which are legitimate and some of which may be based on race. In such instances ... the use of race in pre-contact stage does not give rise to any constitutional protections.” United States v. Travis, 62 F.3d 170, 174 (6th Cir. 1995), cert. denied, 516 U.S. 1060 (1996). Thus, while race may not be used as the sole factor to target an individual during the pre-contact stage, “if at the point an officer decides to *interview/encounter* a suspect he has gathered many reasons for that interview - one being race - the focus of the court is the consensual encounter, and the use of race as one factor in the pre-contact stage may not violate equal protection principles.” Avery, 137 F.3d at 353 (emphasis in original). Further, “common sense dictates that, when determining whom to approach as a suspect of criminal wrongdoing, a police officer may legitimately consider race as a factor if descriptions of the perpetrator known to the officer include race.” United States v. Waldon, 206 F.3d 597, 604 (6th Cir.), cert. denied, 531 U.S. 881 (2000).

E. EPO #5: IDENTIFY WHEN PROBABLE CAUSE EXISTS TO THE EXTENT THAT AN ARREST OR SEARCH MAY BE JUSTIFIED

1. **General Rule – Probable Cause is the Standard for the Issuance of Warrants and the Arrests of Individuals.**
- a. **Issuance of Warrants.** The Fourth Amendment provides that “no Warrant shall issue but upon probable cause” Accordingly, “in cases in which the Fourth Amendment requires that a warrant to search be obtained, ‘probable cause’ is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness.” Camara v. Municipal Court, 387 U.S. 523, 534 (1967). *See also* Franks v. Delaware, 438 U.S. 154, 164 (1978) (“The bulwark of Fourth Amendment protection, of course, is the Warrant Clause, requiring that, absent certain exceptions, police obtain a warrant from a neutral and disinterested magistrate before embarking upon a search”).

- b. **Arrests.** Probable cause is also required before an individual may be arrested for a criminal violation. See, e.g., Michigan v. Summers, 452 U.S. 692, 700 (1981)(Noting “every arrest, and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause”); Dunaway v. New York, 442 U.S. 200, 208 (1979)(“The standard of probable cause thus represented the ... minimum justification necessary to make the kind of intrusion involved in an arrest ‘reasonable’ under the Fourth Amendment”); Gerstein v. Pugh, 420 U.S. 103, 111 (1975)(Noting “the standard for arrest is probable cause”); United States v. Edwards, 242 F.3d 928, 933-34 (10th Cir. 2001) (“To be lawful, a warrantless arrest must be supported by probable cause to arrest”)(quotation omitted); United States v. Cruz-Jimenez, 894 F.2d 1, 4 (1st Cir. 1990) (“ All arrests ... are presumptively unreasonable unless supported by probable cause”).
2. **“Probable Cause” - Defined.** “Articulating precisely what ‘probable cause’ mean[s] is not possible.” Ornelas v. United States, 517 U.S. 690, 695 (1996). Instead, “probable cause is a fluid concept - turning on the assessment of probabilities in particular factual contexts - not readily, or even usefully, reduced to a neat set of legal rules.” Gates, 462 U.S. at 232. See also Maryland v. Pringle, 540 U.S. 366, (2003)(“The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances”); Texas v. Brown, 460 U.S. 730, 742 (1983)(Noting that “probable cause is a flexible, common-sense standard”). Nonetheless, the Supreme Court has noted that, “[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt,” and that the belief of guilt must be particularized with respect to the person to be searched or seized.” Pringle, ___ U.S. at ___, 124 S. Ct. at 800. Accordingly, some basic definitions for probable cause to “arrest” or “search” have been formulated.
- a. **Probable Cause to Search.** The Supreme Court has defined probable cause to search “as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found.” Ornelas, 517 U.S. at 696 [citing Brinegar v. United States, 338 U.S. 160 (1949)].

- b. **Probable Cause to Arrest.** “The standard for arrest is probable cause, defined in terms of facts and circumstances ‘sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.’” Gerstein, 420 U.S. at 111-112 [*quoting Beck v. Ohio*, 379 U.S. 89, 91 (1964)]. See *also* United States v. Hartje, 251 F.3d 771, 775 (8th Cir. 2001), cert. denied, 534 U.S. 1116 (2002)(“Probable cause to conduct a warrantless arrest exists when at the moment of arrest police have knowledge of facts and circumstances grounded in reasonably trustworthy information sufficient to warrant a belief by a prudent person that an offense has been or is being committed by the person to be arrested”); United States v. Buckner, 179 F.3d 834, 837 (9th Cir. 1999)(“Probable cause exists when, under the totality of the circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that [the defendant] had committed a crime”)(citation omitted).
3. **Probable Cause Must Be Based on Facts, Not Mere Conclusions.** “Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others.” Gates, 462 U.S. at 239. See, e.g., United States v. Satterwhite, 980 F.2d 317, 321 (5th Cir. 1992)(“‘Bare bones’ affidavits contain wholly conclusory statements, which lack the facts and circumstances from which a magistrate can independently determine probable cause”); United States v. Wilhelm, 80 F.3d 116, 119 (4th Cir. 1996)(same).

4. **The Test for Probable Cause is “Totality of the Circumstances.”** “Whether probable cause exists depends upon the totality of the circumstances, but it requires a showing of facts ‘sufficient to create a fair probability that evidence of a crime will be found in the place to be searched.’” United States v. Gabrio, 295 F.3d 880, 885 (8th Cir.), cert. denied, 537 U.S. 962 (2002)(citing Gates, 462 U.S. at 238). See also United States v. Greene, 250 F.3d 471, 479 (6th Cir. 2001)(Noting “review of an affidavit and search warrant should rely on a ‘totality of the circumstances’ determination, rather than a line-by-line scrutiny”); United States v. Montgomery, 377 F.3d 582, 590-92 (6th Cir. 2004)(Probable cause to arrest passenger in vehicle for possession with intent to distribute where officer observed a marijuana stem on the driver’s floorboard, a digital scale covered with green leafy material, and white powder was found hidden under the backseat armrest; court noted that, in a drug dealing enterprise, “guilty parties would not likely admit an innocent person into such a criminal enterprise for fear of that person furnishing incriminating evidence against them”); United States v. Velazquez-Rivera, 366 F.3d 661, 664 (8th Cir. 2004)(Probable cause existed under totality of the circumstances based upon (a) the corroborated tip of a confidential informant; (b) suspects’ attempts to elude police by evasive driving; (c) one suspect’s discarding of clothing in an attempt to disguise himself; (d) one officer’s personal knowledge that drugs were traded at the target address; (e) suspects hurried into the target address while police were yelling for them to stop; (f) one suspect removed and threw away the memory chip to his cell phone; and (g) suspect threw keys to one apartment under the door of another while the police were forcing their way into the building).

NOTE: Students should be reminded that, in any probable cause determination, “[t]he focus is not on certitude, but, rather, on the likelihood of criminal activity.” Acosta v. Ames Dep’t Stores, Inc., 386 F.3d 5, 10 (1st Cir. 2004). “The probable cause standard does not require the officers’ conclusion to be ironclad, or even highly probable. Their conclusion that probable cause exists need only be reasonable.” United States v. Winchenbach, 197 F.3d 548, 555-556 (1st Cir. 1999). See also United States v. Trujillo, 376 F.3d 593, 603 (6th Cir. 2004)(Noting that “only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause”)(citation omitted).

5. **There Are Various Methods of Establishing Probable Cause.** A law enforcement officer may establish probable cause in any number of different ways. See, e.g., United States v. Lattner, 385 F.3d 947, 952 (6th Cir. 2004)(Search warrant affidavit “contain[ed] several different kinds of information in the form of anonymous assertions, direct observations, corroboration of assertions, and valid inferences from circumstances,” which, taken together, established probable cause). This includes the following:

- a. **Direct Observations by Law Enforcement Officers May Establish Probable Cause.** Perhaps the easiest way to establish probable cause is through a law enforcement officer's direct observations. "Obviously, direct observation of [a criminal] offense during its commission ... constitutes probable cause." United States v. Marshall, 463 F.2d 1211, 1212 (5th Cir. 1972)[citing Draper v. United States, 358 U.S. 307 (1959)].
- b. **Probable Cause May Be Established Through Smell.** A law enforcement officer may use his sense of smell to establish probable cause, such as when he smells the odor of marijuana emanating from a vehicle or a person. See, e.g., Gerard, 362 F.3d at 489 ("The Supreme Court recognizes that the odor of an illegal drug can be highly probative in establishing probable cause for a search. Circuits have held that the odor of marijuana, standing alone, is sufficient to support probable cause"); United States v. Humphries, 372 F.3d 653, 658 (4th Cir. 2004)(Noting "the odor of marijuana alone can provide probable cause to believe that marijuana is present in a particular place"); United States v. Zabalza, 346 F.3d 1255, 1259 (10th Cir. 2003)("This court has long recognized that marijuana has a distinct smell and that the odor of marijuana alone can satisfy the probable cause requirement to search a vehicle or baggage")(citation omitted); United States v. Taylor, 162 F.3d 12, 21 (1st Cir. 1998)("When looking in, Officer Auger and Sergeant Kennedy immediately detected a 'strong odor' of marijuana. That observation provided probable cause for a search of the car for any narcotics").
- c. **Observations Made By "Fellow" Law Enforcement Officers May Establish Probable Cause.** "Under the 'fellow-officer' rule, law enforcement officials cooperating in an investigation are entitled to rely upon each other's knowledge of facts when forming the conclusion that a suspect has committed or is committing a crime." United States v. Meade, 110 F.3d 190, 193 (1st Cir. 1997). See also United States v. Ventresca, 380 U.S. 102, 111 (1965) ("Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number"); Karr v. Smith, 774 F.2d 1029, 1031 (10th Cir. 1985)("Under the 'fellow officer' rule, 'probable cause is to be determined by the courts on the basis of the collective information of the police involved in the arrest, rather than exclusively on the extent of the knowledge of the particular officer who may actually make the arrest'"). Also referred to as "collective knowledge," "the fellow officer rule underlies the well-worn maxim that 'the collective knowledge and information of all the officers involved establishes probable cause for the arrest.'" Meade, 110 F.3d at 194.

- d. **A Law Enforcement Officer's Training and Experience May Be Used to Establish Probable Cause.** In considering whether probable cause has been established, "the court issuing the warrant is entitled to rely on the training and experience of police officers." United States v. Gil, 58 F.3d 1414, 1418 (9th Cir.), cert. denied, 516 U.S. 969 (1995). *See also* United States v. Soule, 908 F.2d 1032, 1040 (1st Cir. 1990)("The affidavit was prepared by a police officer whose experience and expertise provided the clerk magistrate with further reason to credit the representation in the warrant application"). However, in so doing, most courts require that there must be sufficient additional facts provided to support a determination of probable cause. *See, e.g.,* United States v. Schultz, 14 F.3d 1093, 1097 (6th Cir. 1994) (Holding that although the training and experience of a law enforcement officer may be considered in the determination of probable cause, "it cannot substitute for the lack of evidentiary nexus"); United States v. Rios, 881 F. Supp. 772, 775 (D. Conn. 1995)(Holding that an affidavit containing a law enforcement officer's expert opinion but no facts to support an inference that evidence of the defendant's criminal activity would be found at his home did not provide a substantial basis for a finding of probable cause); United States v. Gomez, 652 F. Supp. 461, 463 (E.D.N.Y. 1987) (Holding that although the issuing judge is entitled to "consider and credit" the expert opinion of a law enforcement officer, "it does not alone provide probable cause to search"). *But see, e.g.,* United States v. Thomas, 989 F.2d 1252, 1254 (D.C. Cir. 1993)(Finding probable cause to search the defendant's home based on his involvement in drug-dealing activities and law enforcement officer's opinion that drug dealers frequently keep evidence of their activities in their houses).
- e. **Information From a Drug-Sniffing Canine May Establish Probable Cause.** Probable cause may also be established through the use of a non-human source, such as a trained drug-sniffing dog. *See, e.g.,* United States v. Jacob, 377 F.3d 573, 580 n.5 (6th Cir. 2004)("Once the drug detection dog alerted to the presence of drugs shortly after the stop, the investigators had probable cause to search the vehicle"); Resendiz v. Miller, 203 F.3d 902, 903 (5th Cir. 2000)("A drug-sniffing canine alert is sufficient, standing alone, to support probable cause for a search"); United States v. Scarborough, 128 F.3d 1373, 1378 (10th Cir. 1997)("It is undisputed that a drug sniffing dog's detection of contraband in itself establishes probable cause for a search warrant").

- 1) **The Dog Must Be Properly Trained.** Of course, the dog must be properly trained and suitably reliable for probable cause to be established based on the dog-sniff alone. See United States v. Hill, 195 F.3d 258, 273 (6th Cir. 1999), cert. denied, 528 U.S. 1176 (2000) (“An alert by a properly-trained and reliable dog establishes probable cause sufficient to justify a warrantless search of a stopped vehicle; United States v. Munroe, 143 F.3d 1113, 1116 (8th Cir. 1998) (“When the canine alerted, the officers then had probable cause to search the vehicle and did not need a search warrant under the automobile exception”).
- 2) **The Failure of a Dog to Alert Does Not Automatically Mean Probable Cause is Lacking.** Additionally, even if the dog does not alert, this does not automatically mean that probable cause is lacking. “Drug-detecting dogs have not supplanted the neutral and detached magistrate as the arbiter of probable cause.” United States v. Glover, 104 F.3d 1570, 1577 (10th Cir. 1997). As noted by one court: “Some contraband simply is not detectable by the drug dogs because only a relatively small quantity of narcotic is contained in the package, the drug is double packaged with plastic, or an odor masking substance such as coffee is used.” Id. at 1577 n.3.

NOTE: The following sections discuss establishing probable cause through hearsay information of various individuals, such as victims, witnesses, and informants. It goes without saying that “hearsay evidence may form the basis for a probable cause determination.” United States v. Mathis, 357 F.3d 1200, 1204 (10th Cir. 2004). *See also* Jones v. United States, 362 U.S. 257, 269 (1960)(“The question here is whether an affidavit which sets out personal observations relating to the existence of cause to search is to be deemed insufficient by virtue of the fact that it sets out not the affiant’s observations but those of another. An affidavit is not to be deemed insufficient on that score, so long as a substantial basis for crediting the hearsay is presented”) (overruled on other grounds); United States v. Helton, 314 F.3d 812, 819 (6th Cir. 2003)(“In evaluating whether probable cause exists for issuing a search warrant, a judicial officer may rely on hearsay evidence”); United States v. Jordan, 999 F.2d 11, 13-14 (1st Cir. 1993)(“Hearsay statements ... often are the stuff of search warrant affidavits”); United States v. Mitchell, 31 F.3d 271, 275 (5th Cir.), cert. denied, 513 U.S. 977 (1994)(“An affidavit may ... employ hearsay as long as it provides a ‘substantial basis for crediting the hearsay’”); Additionally, “multiple layers of hearsay may support a finding of probable cause for a search warrant.” Mathis, 357 F.3d at 1204. In such a situation, each layer of hearsay must meet the test of reliability (veracity and basis of knowledge) discussed below. *See, e.g.,* United States v. Wylie, 705 F.2d 1388, 1390 (4th Cir. 1983)(“In affidavits containing two layers of hearsay, the same two-prong test [veracity and basis of knowledge] must be applied to each level of hearsay. However, double hearsay may satisfy the test”).

- f. **Information From Victims/Witnesses May Establish Probable Cause.** Probable cause may also be established based upon information provided by victims and/or witnesses. "When police officers obtain information from an eyewitness or victim establishing the elements of a crime, the information is almost always sufficient to provide probable cause for an arrest in the absence of evidence that the information, or the person providing it, is not credible." Pasiewicz v. Lake County Forest Pres. Dist., 270 F.3d 520, 524 (7th Cir. 2001). See also Forest v. Pawtucket Police Department, 377 F.3d 52, 57 (1st Cir. 2004)("[P]olice officers can justifiably rely upon the credible complaint by a victim to support a finding of probable cause"); United States v. Phillips, 727 F.2d 392, 397 (5th Cir. 1984)("When an average citizen tenders information to the police, the police should be permitted to assume that they are dealing with a credible person in the absence of special circumstances suggesting that such might not be the case"). "The rationale for the victim or bystander exception is that the statements of such eyewitnesses will presumably be based on their own observations and thus are not likely to reflect 'idle rumor or irresponsible conjecture.'" Phillips, 727 at 397. "Whereas other informants, who often are 'intimately involved with the persons informed upon and with the illegal conduct at hand,' may have personal reasons for giving shaded or otherwise inaccurate information to law enforcement officials, such is not true of bystanders or eyewitness-victims who have no connection with the accused." United States v. Flynn, 664 F.2d 1296, 1302-03 (5th Cir.), cert. denied, 456 U.S. 930 (1982). See also United States v. Schaefer, 87 F.3d 562, 566 (1st Cir. 1996)(Court noted information obtained from neighbors "enjoy[ed] special stature since information provided by ordinary citizens has particular value in the probable cause equation"). Finally, "[v]ictims' complaints are a prime source of investigatory information for police officers. In the absence of circumstances that would raise a reasonably prudent officer's antennae, there is no requirement that the officer corroborate every aspect of every complaint with extrinsic information." Acosta, 386 F.3d at 10.

- g. **Information From Confidential Informants May Be Used to Establish Probable Cause.** “The use of confidential informants in criminal investigations is commonplace.” Schaefer, 87 F.3d at 566. In fact, the use of confidential informants “has been characterized as a necessary part of police work.” Id. However, “[w]hen confronted with hearsay information from a confidential informant or an anonymous tipster, a court must consider the veracity, reliability, and the basis of knowledge for that information as part of the totality of the circumstances for evaluating the impact of that information.” United States v. Helton, 314 F.3d 812, 819 (6th Cir. 2003). See also United States v. Oliva, 385 F.3d 1111, 1114 (7th Cir. 2004)(“An informant’s tip, if reliable, is considered trustworthy information”); United States v. Lucca, 377 F.3d 927, 933 (8th Cir. 2004)(“When a confidential informant provides information in support of a search warrant, the issuing magistrate considers the informant’s reliability and the basis of knowledge”).
- 1) **The Two-Prong Aguilar Test for Confidential Informants.** In Aguilar v. Texas, 378 U.S. 108 (1964), the Supreme Court outlined a two-prong test for determining whether information provided by a confidential informant established probable cause. The two prongs of the “Aguilar Test” revolve around (1) the credibility of the informant and (2) the informant’s basis of knowledge. Of course, “[t]he totality of the circumstances analysis ... does not mandate that both factors be present before a warrant may issue.” Lucca, 377 F.3d at 933. “Instead, a strong showing of one may compensate for a deficiency in the other.” Id.
- a) **Credibility of Source.** Under this prong of the Aguilar test, “facts must be brought before the judicial officer so that he may determine either the inherent credibility of the informant or the reliability of his information on this particular occasion.” 2 W. LaFare, *Search and Seizure* § 3.3(a), p. 91 (3d ed. 1996). Stated differently, a court must “consider the informant’s information - in amount and in degree of reliability - and the degree of corroboration of that information by the officers.” United States v. Navarro, 90 F.3d 1245, 1253 (7th Cir. 1996). Establishing the credibility of a confidential informant can be done in a variety of ways.

- (1) **Proven Track Record.** An informant's tip can be sufficient to establish probable cause if the informant "has a track record of supplying reliable information." United States v. Williams, 10 F.3d 590, 593 (9th Cir. 1993). *See, e.g., United States v. Harris*, 403 U.S. 573, 583 (1971)("We cannot conclude that a policeman's knowledge of a suspect's reputation ... is not a "practical consideration of everyday life" upon which an officer (or a magistrate) may properly rely in assessing the reliability of an informant's tip"); United States v. Hodge, 354 F.3d 305, 311 (4th Cir. 2004) (Noting "a proven, reliable informant is entitled to far more credence than an unknown, anonymous tipster"); United States v. Warren, 42 F.3d 647, 652 (D.C. Cir. 1994)("One of the ways in which reliability of a tip can be substantiated in one respect is by showing that the informant has proven credible in other instances"); United States v. Bynum, 293 F.3d 192, 203 (4th Cir. 2002)(Noting "courts have uniformly held that an informant's veracity is adequately established when the affiant asserts that the informant has supplied information leading to arrests and convictions"). Reference to specific facts in the affidavit can enhance an informant's credibility based on his prior track record.

- (2) **Declarations Against Penal Interest.** “The fact that an informant’s statements are against his or her penal interest adds credibility to the informant’s report.” United States v. Schaefer, 87 F.3d 562, 566 (1st Cir. 1996). As noted by the Supreme Court: “People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility - sufficient at least to support a finding of probable cause to search.” Harris, 403 U.S. at 583. *See also* United States v. Ketzeback, 358 F.3d 987, 991 (8th Cir. 2004)(Reliability of CI exhibited where he “implicated himself in drug activity while in custody on entirely unrelated and relatively minor charges”); United States v. Soriano, 346 F.3d 963, 972 (9th Cir. 2003) (“When considering reliability, the courts may employ a number of methods to determine if an informant’s information is reliable. It may be demonstrated ... by admission against penal interest, for example”) (internal quotation marks and citation omitted); United States v. Fields, 72 F.3d 1200, 1215 (5th Cir.), *cert. denied*, 519 U.S. 807 (1996)(Credibility of informant established where, *inter alia*, they “also implicated themselves in illegal drug activities and made admissions against penal interest”); Turner v. Caspari, 38 F.3d 388, 393 (8th Cir. 1994)(same); Gabrio, 295 F.3d at 885 (Reliability established where “affidavit stated that the informant had provided reliable information on at least two prior occasions and had returned stolen property to law enforcement officers”).

- (3) **Corroboration of the Informant's Information.** "When there is sufficient independent corroboration of an informant's information, there is no need to establish the veracity of the informant." United States v. Danhauer, 229 F.3d 1002, 1006 (10th Cir. 2000). *See also* Ganser, 315 F.3d at 843 ("If an informant is shown to be right about some things, he is probably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity")(internal quotations omitted); United States v. Nielsen, 371 F.3d 574, 580 (9th Cir. 2004)(Informant information found reliable where officer "corroborated certain factual details contained in the informants' statements"); United States v. Formaro, 152 F.3d 768, 770 (8th Cir. 1998) ("Corroboration of the [confidential informant's] information by independent investigation is an important factor in the calculus of probable cause"); United States v. Khounsavanh, 113 F.3d 279, 284 (1st Cir. 1997)(Court noted that among the factors to be considered in determining whether probable cause existed included "whether some or all the informant's factual statements were corroborated wherever reasonable and practicable (e.g., through police surveillance)"; U.S. v. Williams, 477 F.3d 554 (8th Cir. 2007) (holding that probable cause was not defeated by failure to mention informant's criminal history if information is at least partially corroborated or informant's reliability otherwise established, such as with a proven track record).

- (4) **Direct Observations by the Informant.** "First-hand observations by a CI support a finding of reliability." United States v. Johnson, 289 F.3d 1034, 1039 (7th Cir. 2002). See, e.g., Gates, 462 U.S. at 234 ("Even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed **first hand**, entitles his tip to greater weight than might otherwise be the case")(emphasis added); Harris, 403 U.S. at 581 (Reliability of informant found because, *inter alia*, affidavits "purport to relate the personal observations of the informant"); Nielsen, 371 F.3d at 580 (Informant information considered more reliable where all informants "stated they had firsthand knowledge" of defendant's drug trafficking "based on their earlier methamphetamine buys"); United States v. Taylor, 985 F.2d 3, 6 (1st Cir.), cert. denied, 508 U.S. 944 (1993)("The affidavit may disclose an adequate basis for evaluating the informant's veracity through the very specificity and detail with which it relates the informant's first-hand description of the place to be searched or the items to be seized"); United States v. Cochrane, 896 F.2d 635, 641 (1st Cir.), cert. denied, 496 U.S. 929 (1990)("An important indicia of reliability is the fact that the informant's knowledge was based upon personal observation").
- (5) **Informant's Presence Before the Magistrate Judge.** "When a [confidential informant] accompanies the officer and is available to give testimony before the judge issuing the warrant, his presence adds to the reliability of the information used to obtain the warrant, because it provides the judge with an opportunity to assess the informant's credibility and allay any concerns he might have had about the veracity of the informant's statements." Johnson, 289 F.3d at 1040. See also United States v. Lloyd, 71 F.3d 1256, 1262 (7th Cir. 1995)(same), cert. denied, 517 U.S. 1250 (1996).

- (6) **Face-to-Face Meeting Between Officer and Informant.** Whether the information was provided by the informant in a face-to-face encounter with the affiant can be considered in determining the informant's reliability. *See, e.g., Gabrio*, 295 F.3d at 885 (Noting that, among the factors to consider in determining informant's reliability was the affiant's opportunity "to assess the informant's credibility because he gave his tip in person"); *United States v. Robertson*, 39 F.3d 891, 893 (8th Cir. 1994), cert. denied, 514 U.S. 1090 (1995)(Reliability of informant established, in part, because affiant was "allowed ... to question the informant face-to-face and to determine whether he or she appeared to be a credible person. That first-hand observation gives greater weight to [affiant's] decision to rely on the informant's information").
- (7) **Consistency Between Independent Informants.** "Courts often have held that consistency between the reports of two independent informants helps to validate both accounts." *Schaefer*, 87 F.3d at 566. *See also Nielsen*, 371 F.3d at 580 (Court noted "the veracity of [the informants] is buttressed by the similarity of their accounts"); *United States v. Oropesa*, 316 F.3d 762, 768 (8th Cir. 2003)("Not only had Brooks proved to be a reliable informant, as evidenced by the arrest of Brooks' second drug source just two weeks earlier, two other informants corroborated Brooks' information that Oropesa sold drugs out of his home and automotive shop"); (*United States v. Fields*, 72 F.3d 1200, 1214 (5th Cir.), cert. denied, 519 U.S. 807 (1996)("Each informant gave information to the police independent of the other informants, and each one's information corroborate the others"); *United States v. Thao Dinh Le*, 173 F.3d 1258, 1266 (10th Cir. 1998)(Probable cause found where, *inter alia*, "the affidavit contained information provided by two different informants whose stories were remarkably consistent"); *United States v. Pritchard*, 745 F.2d 1112, 1121 (7th Cir. 1984)("By telling consistent yet independent stories, the informants provide 'cross-corroboration,' and enhance the reliability of the application as a whole").

- (8) **The Degree of Detail Given By the Informant.** The degree of detail given by an informant may also be considered in determining the veracity of an informant's tip. See, e.g., United States v. Koerth, 312 F.3d 862, 866 (7th Cir. 2002), cert. denied, 538 U.S. 1020 (2003); United States v. Padro, 52 F.3d 120, 123 (6th Cir. 1995) ("The richness of detail provided by an informant increases the reliability of the information").
- (9) **Any Personal Interest of the Informant.** An informant's "personal interest can create a 'strong motive to supply accurate information'" to law enforcement officers. United States v. DeQuasie, 373 F.3d 509, 523 (4th Cir. 2004). See also United States v. Perez, 393 F.3d 457, 462 (4th Cir. 2004)(Noting that informant's statement "reflected his personal concern for his girlfriend's well-being, which we have found to be another indication of an informant's credibility").
- (10) **9-1-1 calls.** If an anonymous 9-1-1 caller's information establishes a reasonable belief that someone is in imminent peril, there is no requirement to establish the caller's identity or reliability before acting on the information. U.S. v. Elder, 466 F.3d 1090 (7th Cir. 2006).

b) **Basis of Knowledge.** In addition to the “credibility of source,” “under Aguilar, the ‘basis of knowledge’ prong also needed to be satisfied.” 2 W. LaFare, *Search and Seizure* § 3.3(a), p. 92 (3d ed. 1996). “It is critical to a showing of probable cause that the affidavit state facts sufficient to justify a conclusion that evidence or contraband will probably be found at the premises to be searched.” United States v. Hove, 848 F.2d 137, 140 (9th Cir. 1988). “In determining whether an affidavit based upon an informant’s tips provides a substantial basis for a finding of probable cause, ‘an ‘explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles [the informant’s] tip to greater weight than might otherwise be the case.’” United States v. Sonagere, 30 F.3d 51, 53 (6th Cir. 1994)(*quoting Gates*, 462 U.S. at 234). See also Johnson, 289 F.3d at 1039 (Where the confidential informant had direct observation of the defendant’s criminal activity, this “established the [informant’s] basis of knowledge”). In essence, the “basis of knowledge” prong requires the government to provide sufficient information to show the informant knows who is involved in the criminal activity, what criminal activity is taking place, where and when the criminal activity is taking place, and how the informant became aware of this information. See, e.g., United States v. Bishop, 264 F.3d 919, 925 (9th Cir. 2001) (“When considering the basis of knowledge, courts look for how the informant came by his or her knowledge”)(internal quotation marks and citation omitted).

2) **Aguilar and Gates.** In Gates, the two-part Aguilar test (outlined above) was rejected by the Supreme Court as “hypertechnical and divorced from ‘the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.’” Massachusetts v. Upton, 466 U.S. 727, 732 (1984)(citation omitted). Instead, the Court adopted a “totality of the circumstances” approach to determining probable cause. “The phrase means simply that the court considers all data relevant to the probability of a crime being committed, without having to satisfy the two independent requirements (or proverbial “prongs”) of the Aguilar test” United States v. Riley, 351 F.3d 1265, 1267 (D.C. Cir. 2003). However, while “Gates replaced the two-pronged framework of Aguilar ... with the totality of the circumstances test,” Khounsavanh, 113 F.3d at 283, “the Gates Court agreed that the Aguilar ... factors, including ‘an informant’s ‘veracity,’ ‘reliability’ and ‘basis of knowledge’ are all highly relevant in determining the value of his report.” Id. at 284 (citation omitted).

6. **Duty to Investigate Once Probable Cause is Established.** “Probable cause determinations are, virtually by definition, preliminary and tentative.” Acosta, 386 F.3d at 11. For this reason, “the Supreme Court has flatly rejected the idea that the police have a standing obligation to investigate potential defenses before finding probable cause.” Id. Thus, as a general rule, “[o]nce a police officer discovers sufficient facts to establish probable cause, she has no constitutional obligation to conduct any further investigation in the hope of discovering exculpatory evidence.” Hodgkins v. Peterson, 355 F.3d 1048, 1061 (7th Cir. 2004). See also Brodnicki v. City of Omaha, 75 F.3d 1261, 1264 (8th Cir.), cert. denied, 519 U.S. 867 (1996) (“The officers were not required to conduct a mini-trial before arresting Brodnicki”). Thus, while a police officer may not ignore conclusively established evidence of the existence of an affirmative defense, Estate of Dietrich v. Burrows, 167 F.3d 1007, 1012 (6th Cir. 1999), the officer has no duty to investigate the validity of any defense. Baker v. McCollan, 443 U.S. 137, 145-46 (1979).

F. EPO #6: IDENTIFY THE ORIGIN, PURPOSE AND SCOPE OF THE EXCLUSIONARY RULE

1. **General Rule – Evidence Obtained in Violation of the Fourth Amendment is Generally Inadmissible at Trial.** The Supreme Court has long recognized that “the Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands.” Arizona v. Evans, 514 U.S. 1, 10 (1995). Instead, the Court has developed the “exclusionary rule,” which “operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule’s general deterrent effect.” Id. See also United States v. Leon, 468 U.S. 897, 906 (1984); United States v. Calandra, 414 U.S. 338, 354 (1974).
2. **The Purpose of the Rule is to Deter Police Misconduct.** Historically, “the exclusionary rule [was] designed to deter police misconduct...” Leon, 468 U.S. at 916. See also Elkins v. United States, 364 U.S. 206, 217 (1960) (“Its purpose is to deter - to compel respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it”); United States v. Johnson, 364 F.3d 1185, 1190 (10th Cir. 2004) (“The purpose of the Fourth Amendment and the associated exclusionary rule is not to grant certain guilty defendants a windfall by letting them go free - though it sometimes does do that. The objective is rather to protect *all* citizens, particularly the innocent, by deterring overzealous police behavior”)(emphasis in original); United States v. Merritt, 361 F.3d 1005, 1009 (7th Cir. 2004) (“The exclusionary rule has such a deterrent effect when, by punishing behavior which violates a citizen’s Fourth Amendment rights and removing the incentive for its repetition, it alters the behavior of individual law-enforcement officers or the policies of their departments”)(internal citations and quotations omitted); Sanna v. Dipaolo, 265 F.3d 1, 7 (1st Cir. 2001)(Noting that, “the exclusion of the evidence derived, directly or indirectly, from [a Fourth Amendment] violation ... is designed to deter law enforcement personnel from disregarding constitutional mandates”).

3. **Historical Development of the Rule**

- a. **Weeks v. United States, 232 U.S. 383 (1914).** In Weeks, the Supreme Court first adopted the exclusionary rule for violations of the Fourth Amendment. The rationale for the rule's adoption was simple: In cases where illegally seized evidence "can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." However, at this point in history, the exclusionary rule applied only to federal law enforcement officers. It did not apply to illegal searches by state law enforcement personnel. This anomaly resulted in what was known as the "silver platter doctrine," in which state law enforcement officers could turn over illegally obtained evidence to federal authorities for use in federal prosecutions. The Supreme Court later abolished the "silver platter doctrine" in Elkins v. United States, 364 U.S. 206 (1960).
- b. **Mapp v. Ohio, 367 U.S. 643 (1961).** In Mapp, the Supreme Court, by means of the Due Process Clause of the Fourteenth Amendment, imposed the exclusionary rule of the Fourth Amendment on the states. As stated by the Court, the exclusionary rule was applicable to the states and "is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause." Id. at 660.
- c. **Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).** In Silverthorne, the Supreme Court established the "fruit of the poisonous tree" doctrine. This doctrine generally prohibits using illegally seized evidence as a means of obtaining still more evidence. Here, after recognizing that certain documents had been obtained in an unconstitutional manner, the prosecuting attorney directed that they be returned to the company. Before returning them, however, photographs were taken. The prosecuting attorney then issued a subpoena for the production of the documents, using the photographs for as the basis. In sum, the Court held:

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." Id. at 392.

4. **A Defendant Must Make Two (2) Showings to Benefit From Application of the Exclusionary Rule.** "A party seeking exclusion of evidence on Fourth Amendment grounds must demonstrate both actual police misconduct that violated the defendant's Fourth Amendment rights, and that the evidence to be excluded was in a fact a product of the police misconduct." United States v. Williams, 356 F.3d 1268, 1272 (10th Cir. 2004).

G. EPO #7: IDENTIFY EXCEPTIONS TO THE EXCLUSIONARY RULE, E.G., NO STANDING TO OBJECT, GOOD FAITH, INEVITABLE DISCOVERY, AND IMPEACHMENT

1. **Evidence Obtained in Violation of the Fourth Amendment May Be Admissible Against a Defendant in Certain Circumstances.** "Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons." United States v. Calandra, 414 U.S. 338, 348 (1974).
2. **There Are a Variety of Exceptions to the Exclusionary Rule.** Listed below are some of the more common exceptions to the exclusionary rule.
 - a. **Evidence Will Be Admissible if the Defendant Has No Standing to Object.** "The Fourth Amendment is 'a personal right that must be invoked by an individual.'" Minnesota v. Carter, 525 U.S. 83, 88 (1998). "In order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable." Id. at 88. Thus, "only defendants whose Fourth Amendment rights have been violated [may] benefit from the [exclusionary] rule's protections." Rakas v. Illinois, 439 U.S. 128, 134 (1978). *See also* Rawlings v. Kentucky, 448 U.S. 98, 106 (1980)(Finding that defendant lacked standing to object to a search of a friend's purse because he "had no legitimate expectation of privacy in [the] purse at the time of the search"); Rakas, 439 U.S. at 140 ("The question is whether the challenged search and seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it"); and United States v. Salvucci, 448 U.S. 83, 93 (1980); (Court noted that key issue when discussing standing was "whether [the defendant] had an expectation of privacy in the area searched").

- b. **Evidence May Be Admissible to Impeach the Defendant.** The Supreme Court has repeatedly held that “when defendants testify, they must testify truthfully or suffer the consequences.” United States v. Havens, 446 U.S. 620, 626 (1980). Where a defendant takes the witness stand and testifies falsely, the government may cross-examine the defendant and impeach him with evidence that was obtained in violation of the Fourth Amendment. Were it otherwise, “the defendant’s constitutional shield against having illegally seized evidence used against him could be ‘perverted into a license to use perjury by way of a defense.’” Id. “The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him.” Michelson v. United States, 335 U.S. 469, 479 (1948). Under the impeachment exception, illegally obtained evidence can be used to impeach:

- 1) **Any testimony given by a defendant on direct examination**, Walder v. United States, 347 U.S. 62 (1954); or
- 2) **A defendant’s statements made in response to proper cross-examination reasonably suggested by the defendant’s direct examination**, United States v. Havens, 446 U.S. 620, 627 (1980).

However, suppressed evidence may only be used to impeach the defendant’s testimony. This exception has not been expanded to allow impeachment of other defense witnesses with illegally seized evidence. James v. Illinois, 493 U.S. 307 (1990). Thus, if the defendant elects not to take the witness stand, the impeachment exception is inapplicable.

- c. **Evidence Obtained in Good Faith Reliance Upon a Search Warrant May Be Admissible.** As a general rule, a law enforcement officer is not expected to question a probable cause determination made by a magistrate. United States v. Krull, 480 U.S. 340, 349 (1987). Instead, “a magistrate’s determination of probable cause is to be given considerable weight and should be overruled only when the supporting affidavit, read as a whole in a realistic and common sense manner, does not allege specific facts and circumstances from which the magistrate could reasonably conclude that the items sought to be seized are associated with the crime and located in the place indicated.” United States v. Spry, 190 F.3d 829, 835 (7th Cir. 1999)(internal quotations omitted), cert. denied, 528 U.S. 1130 (2000). In United States v. Leon, 468 U.S. 897 (1984), the Supreme Court carved out a “good faith” exception to the exclusionary rule based on the premises outlined above.

- 1) **General Rule – Where An Officer Relies in Good Faith on a Warrant Issued by a Neutral and Detached Magistrate, Evidence Obtained Will Be Admissible.** In sum, the “good faith” exception provides that, if a neutral and detached judicial officer erroneously issues a search warrant (and, presumably, an arrest warrant) based upon what is reasonably believed to be probable cause, law enforcement officers may still retain the fruits of the search and/or seizure. *See, e.g., United States v. Scroggins*, 361 F.3d 1075, 1084 (8th Cir. 2004) (“The good-faith exception is perfectly suited for cases ... when the judge’s decision was borderline”); *United States v. Ricciardelli*, 998 F.2d 8, 15 (1st Cir. 1993) (“If ... the warrant’s defectiveness results from mere technical errors, bevues by the magistrate not readily evident to a competent officer, or borderline calls about the existence of probable cause, then the evidence may be used, despite the warrant’s defectiveness”).
 - a) **Rationale Behind the “Good Faith” Exception.** In *Leon*, the Court announced three (3) separate rationale’s underlying the adoption of a “good faith” exception to the exclusionary rule.
 - (1) **Exclusionary Rule is to Deter Police, Rather Than Judges.** “First, the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates.” *Id.* at 916.
 - (2) **No Evidence Exclusionary Rule Should Apply Where Judges are Mistaken.** “Second, there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion.” *Id.*
 - (3) **Application of the Rule Will Not Have a Significant Deterrent Effect on Judges.** “Third, and most important, ... [there] is no basis for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate.” *Id.*

See *also* United States v. Carpenter, 341 F.3d 666, 669 (8th Cir. 2003)(In creating a “good faith” exception, “the Court drew a clear distinction between the motivations of detached, neutral magistrates and those of partisan enforcement officers who are ‘engaged in the often competitive enterprise of ferreting out crime’”(quoting Leon, 468 U.S. at 914); United States v. Capozzi, 347 F.3d 327, 332 (1st Cir. 2003), cert. denied, 540 U.S. 1168, 124 S. Ct. 1187 (2004)(“The [Supreme] Court recognized that the purpose of this exclusionary rule is to deter police misconduct; therefore, it declined to apply the rule in circumstances where an officer acts in good faith to obtain a warrant because suppression in such instances does not ‘logically contribute to the deterrence of Fourth Amendment violations’”(citation omitted).

- b) **The “Good Faith” Exception Has Limitations.** However, the “good faith” exception is not without limits. See, e.g., United States v. Payne, 341 F.3d 393, 399-400 (5th Cir. 2003); Capozzi, 347 F.3d at 332 (Noting that, “while Leon restricts the application of the exclusionary rule, it does not eliminate it”); United States v. Goody, 377 F.3d 834, 837 (8th Cir. 2004)(Noting that “good faith is not a magic lamp for police officers to rub whenever they find themselves in trouble,” and that “the exception is inapplicable in certain circumstances”)(internal citations and quotation marks omitted). Specifically, in Leon, “the Court provided detailed guidance to define those limited situations in which reliance on a warrant could not justify suspension of the ‘extreme sanction of exclusion.’” Carpenter, 341 F.3d at 669. The exception will not apply if any of the following four circumstances.

- (1) **If the Affidavit Contained False or Misleading Information, the Good Faith Exception Will Not Apply.** First, “suppression ... remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth.” Leon, 468 U.S. at 923 [citing Franks v. Delaware, 438 U.S. 154 (1978)]. This issue is discussed more fully in **EPO # 13.**

- (2) **If the Magistrate Judge Whom Issued the Warrant was Not Neutral and Detached, the Good Faith Exception Will Not Apply.** Second, “the exception ... will also not apply in cases where the issuing magistrate wholly abandoned his judicial role ...; in such circumstances, no reasonably well trained officer should rely on the warrant.” Leon, 468 U.S. at 923. See also Carpenter, 341 F.3d at 670 (“In such a case, the issuing magistrate does not serve as a neutral and detached actor, but rather as a ‘rubber stamp for the police’ and ‘an adjunct law enforcement officer’”)(*quoting* Leon, 468 U.S. at 914); United States v. Koerth, 312 F.3d 862, 868 (7th Cir. 2002), cert. denied, 538 U.S. 1020 (2003)(“An officer may not rely upon a search warrant if he is aware or had reason to believe that the magistrate improperly issued the warrant without meaningfully and critically evaluating the evidence presented at the probable cause hearing”).
- (3) **Where the Warrant Clearly Lacks Probable Cause, the Good Faith Exception Will Not Apply.** “Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit ‘so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.’” Leon, 468 U.S. at 923.
- (4) **Where the Warrant is Facially Deficient, the Good Faith Exception Will Not Apply.** Finally, there might be cases in which “a warrant may be so facially deficient - i.e., in failing to particularize the place to be searched or the things to be seized - that the executing officers cannot reasonably presume it to be valid.” “ Leon, 468 U.S. at 923.

- 2) **The Good Faith Exception Will Apply to Erroneous Arrest Records.** When an arrest is made based on a law enforcement officer's reasonable reliance upon erroneous computer arrest records, the "good faith" exception will apply to any evidence seized during search incident to arrest. Arizona v. Evans, 514 U.S. 1 (1995). To suppress the evidence in such circumstances would not further the deterrent purpose of the exclusionary rule: "Because court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion of evidence could not be expected to deter such individuals from failing to inform police officials that a warrant had been quashed." Id. at 15 (citations omitted). *** INSTRUCTOR NOTE [NEED NOT BE TAUGHT]: This aspect of the good faith exception has been extended to cover isolated errors in databases maintained by law enforcement officers. United States v. Herring, 129 S. Ct. 695; 2009 U.S. LEXIS 581 (2009). In that case, Herring was convicted of possessing contraband discovered during a search incident to his arrest. The arrest was made based on an adjoining county sheriff's report that they had an outstanding arrest warrant for Herring. After the search had produced contraband, the arresting officers discovered the law enforcement database entry was wrong. The Court held that this kind of isolated negligence did not mandate exclusion. However, the Court was careful to note, "We do not suggest that all recordkeeping errors by the police are immune from the exclusionary rule.... If the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified." 129 S.Ct. at 703. Many commentators suggest that this case signals further contraction of the exclusionary rule on the horizon.
- d. **Evidence Obtained During a Foreign Search May Be Admissible.** As a general rule, "the Fourth Amendment and the exclusionary rule do not ordinarily apply to foreign searches and seizures." United States v. Mitro, 880 F.2d 1480, 1482 (1st Cir. 1989). See also United States v. Janis, 428 U.S. 433, 456 n.31 (1976) ("It is well established, of course, that the exclusionary rule, as a deterrent sanction, is not applicable where ... a foreign government commits the offending act"). Nevertheless, "[f]or United States citizens and resident aliens, the Fourth Amendment applies to foreign searches and seizures: (1) conducted exclusively by the United States government, (2) conducted by the United States in a 'joint venture' with foreign authorities, or (3) where foreign authorities act as agents for the United States." *Federal Narcotics Prosecutions*, 2d Ed., Office of Legal Education, Department of Justice, at 1116 (March 2004).

- 1) **Searches By Foreign Authorities.** “The Fourth Amendment exclusionary rule does not apply to foreign searches by foreign officials in enforcement of foreign law, even if those from whom evidence is seized are American citizens.” United States v. Rose, 570 F.2d 1358, 1361 (9th Cir. 1978). See *also* United States v. Behety, 32 F.3d 503, 510 (11th Cir. 1994), *cert. denied*, 515 U.S. 1137 (1995)(“Evidence obtained by foreign police officials from searches conducted in their country is generally admissible in federal court regardless of whether the search complied with the Fourth Amendment”). Accordingly, “[t]he ‘exclusionary rule’ does not require the suppression of evidence seized by foreign police agents, for the actions of an American court are unlikely to influence the conduct of foreign police.” United States v. Hensel, 699 F.2d 18, 25 (1st Cir.), *cert. denied*, 461 U.S. 958 (1983). See *also* Stonehill v. United States, 405 F.2d 738, 743 (9th Cir. 1968), *cert denied*, 395 U.S. 960, *reh’g denied*, 396 U.S. 870 (1969)(“Neither the Fourth Amendment of the United States Constitution nor the exclusionary rule of evidence, designed to deter Federal officers from violating the Fourth Amendment, is applicable to the acts of foreign officials”); United States v. Barona, 56 F.3d 1087, 1091 (9th Cir. 1995)(Same). However, there “are two well-established exceptions to this rule: (1) where foreign police conduct ‘shock[s] the judicial conscience,’ and (2) where American agents ‘participated in the foreign search, or . . . [the foreign officers acted] as agents for their American counterparts.’” Hensel, 699 F.2d at 25 (internal quotations and citations omitted).
- a) **Conduct That “Shocks the Conscience.”** Based upon their inherent supervisory powers, as well as the Due Process Clause, a Federal court “may suppress any foreign search evidence obtained by methods that “shock the conscience.” *Federal Narcotics Prosecutions*, 2d Ed., Office of Legal Education, Department of Justice, at 1120. See *also* Barona, 56 F.3d. at 1092 (“This type of exclusion is not based on our Fourth Amendment jurisprudence, but rather on the recognition that we may employ our supervisory powers when absolutely necessary to preserve the integrity of the criminal justice system”). “Only conduct on the part of the foreign police that shocks the judicial conscience could warrant the suppression of foreign-seized evidence. Circumstances that will shock the conscience are limited to conduct that ‘not only violates U.S. notions of due process, but also violates fundamental international norms of decency.’” Mitro, 880 F.2d at 1483, 1484 (internal footnote omitted).

NOTE: “[T]here is some debate as to whether a federal court has the authority to exclude evidence seized by foreign officials even in circumstances that shock the judicial conscience in light of United States v. Payner, 447 U.S. 727 (1980), where the Supreme Court held that a federal court could not exclude evidence under its supervisory power where the defendant would not have standing to seek exclusion under the Fourth Amendment.” Mitro, 880 F.2d at 1484 n.4.

- b) **Instrument/Agent or Participation.** “The second exception to the inapplicability of the exclusionary rule applies when United States agents’ participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials.” Barona, 56 F.3d at 1092 (citation and internal quotation marks omitted).
- (1) **Joint Venture.** The Fourth Amendment will apply if “American participation in the foreign search or seizure rendered the acts a joint venture.” P. Joseph, *Warrantless Search Law Deskbook* § 5.5, p. 5-16.3 (2000). See Stonehill, 405 F.2d at 743 (“The Fourth Amendment could apply to raids by foreign officials only if Federal agents so substantially participated in the raids so as to convert them into joint ventures between the United States and the foreign officials”); United States v. Mount, 757 F.2d 1315, 1318 (D.C. Cir. 1985)(Collecting cases and noting “the exclusionary rule does apply to a foreign search if American officials or officers participated in some significant way, for in such a situation the deterrence principle may be deemed to operate”).

NOTE: Whether the participation of Federal law enforcement officers renders a search a “joint venture” must be “determined by a thorough examination of the facts of each case.” Stonehill, 405 F.2d at 745. However, simply “providing information to a foreign functionary is not sufficient involvement for the Government to be considered a participant in acts the foreign functionary takes based on that information.” United States v. Marzano, 537 F.2d 257, 270 (7th Cir. 1976) (Collecting cases). Further, the “mere presence of federal officers is not sufficient to make the officers participants.” Id. See also Stonehill, 405 F.2d at 745; United States v. Rosenthal, 793 F.3d 1214, 1231 (11th Cir. 1986), cert. denied, 480 U.S. 919 (1987) (“Fourth Amendment rights are generally inapplicable to an action by a foreign sovereign in its own territory in enforcing its own laws, even though American officials are present and cooperate in some degree”); United States v. Johnson, 451 F.2d 1321 (4th Cir. 1971), cert. denied, 405 U.S. 1018 (1972).

- (2) **Instrument or Agent.** The mandates of the Fourth Amendment will also apply if “the foreign official was acting as an instrument or agent of an American government official” P. Joseph, *Warrantless Search Law Deskbook* § 5.5, p. 5-16.3 (2000).

- 2) **Searches of Non-Resident Aliens By American Law Enforcement Officers.** In United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), the Supreme Court addressed the issue of “whether the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country.” Id. at 261. In sum, the court answered this question in the negative, holding that “the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.” Id. at 266. The Court noted that “‘the people’ protected by the Fourth Amendment ... refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.” Id. at 265. Accordingly, “aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the country.” Id. at 271. So, for example, “once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders.” Id. Alternatively, where the alien was lawfully, albeit involuntarily, brought to this country, “this sort of presence ... is not of the sort to indicate any substantial connection with our country.” Id.

NOTE: “The Fourth Amendment was not ‘understood by contemporaries of the Framers to apply to activities of the United States directed against aliens in foreign territory or in international waters.’ The Fourth Amendment does not apply to a search of aliens conducted in foreign territory. The Fourth Amendment does not apply to the search of non-resident aliens on a ship in international waters.” United States v. Aikins, 946 F.2d 608, 613 (9th Cir. 1990)(internal citations omitted).

- a) **Controls Over American Activities in Foreign Countries.** "Although the Fourth Amendment does not apply to foreign searches of the property of a non-resident alien, controls exist over the investigative activities of American agents operating in foreign countries." *Federal Narcotics Prosecutions*, 2d Ed., Office of Legal Education, Department of Justice, at 1117. Specifically, "[b]esides the obligations imposed by the host countries themselves, Congress has restricted American agents' foreign activities." *Id.* For example, "[i]n the narcotics area, Congress has prohibited American agents from directly effecting 'an arrest in any foreign country as part of any foreign police action with respect to narcotic control efforts' and has prohibited American agents from interrogating or being present 'during the interrogation of any United States person arrested in any foreign country with respect to narcotic control efforts.'" *Id.* (citing Title 22 U.S.C. § 2291).
- b) **Agreements and Treaties.** "The United States has entered into agreements and treaties with other countries which provide for mutual legal assistance and establish procedures for obtaining evidence in criminal investigations abroad." *Id.* Further, "[t]he Office of International Affairs, (202) 514-0000, provides advice and assistance regarding the requirements for these agreements, and maintains a current list of mutual legal assistance agreements and treaties." *Id.* This list can be viewed on the DOJNET, at: <http://10.173.2.12/criminal/oia/MLAT.html>.

NOTE: A question that may be asked during a discussion of foreign searches and seizures is this: If a defendant is brought to this country to stand trial through a “forcible abduction,” may he still be tried in Federal court? In ruling on this question, the Supreme Court has noted that “the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court’s jurisdiction by reason of a ‘forcible abduction.’” Frisbie v. Collins, 342 U.S. 519, 511 (1952)[*citing Ker v. Illinois*, 119 U.S. 436, 444 (1886)]. Most recently, this concept was reiterated in United States v. Alvarez-Machain, 504 U.S. 655, 657 (1992), where the Court held that “a criminal defendant, abducted to the United States from a nation with which it has an extradition treaty, [does not] thereby acquire a defense to the jurisdiction of this country’s courts.” Instead, courts are to refer to the terms of the extradition treaty to determine whether the abduction was a violation. Thus, “[u]nder Alvarez-Machain, to prevail on an extradition treaty claim, a defendant must demonstrate, by reference to the express language of a treaty and/or the established practice thereunder, that the United States affirmatively agreed not to seize foreign nationals from the territory of its treaty partner.” United States v. Noriega, 117 F.3d 1206, 1213 (11th Cir. 1997), *cert. denied*, 523 U.S. 1060 (1998). Finally, at least one court has created an exception to the “Ker - Frisbie” rule for situations in which a defendant is brought to this country for trial through “the use of torture, brutality and similar outrageous conduct.” United States ex rel. Lujan v. Gengler, 510 F.2d 62, 65 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975). However, “[t]he Supreme Court has yet to rule on this exception, and ‘no court ... which remanded the case for factual findings, has ever found conduct that rises to the level necessary to require the United States to divest itself of jurisdiction.’” Robert Iraola, *A Primer on Legal Issues Surrounding the Extraterritorial Apprehension of Criminals*, 29 Am. J. Crim. L. 1, 8 (2001).

- 3) **Searches of United States Citizens and Resident Aliens in Foreign Countries.** “When conducted by, on behalf of, or jointly with the United States Government, the Fourth Amendment applies to searches and seizures against United States citizens and resident aliens while abroad.” *Federal Narcotics Prosecutions*, 2d Ed., Office of Legal Education, Department of Justice, at 1118.

- a) **When the Fourth Amendment Applies.** Generally speaking, the Fourth Amendment applies to overseas searches in three (3) related situations:
- (1) **Searches By American Law Enforcement Personnel Only.** See, e.g., United States v. Conroy, 589 F.2d 1258, 1264 (5th Cir.), cert. denied, 444 U.S. 831 (1979) (“The Fourth Amendment not only protects all within our bounds; it also shelters our citizens wherever they may be in the world from unreasonable searches by our own government”).
 - (2) **Searches By Foreign Law Enforcement Agents Acting On Behalf of the United States Government.** See, e.g., Rose, 570 F.2d at 1362 (Noting that, “if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts, the exclusionary rule can be invoked”).
 - (3) **Where Search is a “Joint Venture.”** See, e.g., Behety, 32 F.3d at 510-511. (Noting “the exclusionary rule may be invoked if American law enforcement officials substantially participated in the search or if the foreign officials conducting the search were actually acting as agents for their American counterparts. Some courts have described this exception as the joint venture doctrine, and explain that it requires that the participation of federal agents be so substantial so as to convert the search into a joint venture”).

b) **Any Overseas Search Must Be Reasonable.** Rule 41 of the Federal Rules of Criminal Procedure does not authorize a Federal judge to issue a search warrant for a location outside the United States. In fact, even if such a warrant were issued, it would be a “dead letter outside the United States.” Verdugo-Urquidez, 494 U.S. at 274. And, “[e]ven if no warrant were required, American agents would have to articulate specific facts giving them probable cause to undertake a search or seizure if they wished to comply with the Fourth Amendment” Id. Instead, any search that is conducted must meet the reasonableness requirements of the Fourth Amendment. While American “law governs whether illegally obtained evidence should be excluded, and the essence of [that] inquiry is whether exclusion serves the rationale of deterring federal officers from unlawful conduct,” United States v. Peterson, 812 F.2d 486, 491-92 (9th Cir. 1987), any analysis of the reasonableness of a foreign search will generally include a review of local foreign law on the subject. Barona, 56 F.3d at 1092 (“If a joint venture is found to have existed, “the law of the foreign country must be consulted at the outset as part of the determination whether or not the search was reasonable”)(citation omitted).

(1) **Compliance With Foreign Law Not Dispositive On Issue of Reasonableness.** At least two Federal courts have decided that compliance with the law of the foreign nation in which the search occurred is not dispositive on the issue of a search’s reasonableness. See Conroy, 589 F.2d at 1265 (“The mere consent of foreign authorities to a seizure that would be unconstitutional in the United States does not dissipate its illegality even though the search would be valid under local law”); United States v. Andreas, 1998 U.S. Dist. LEXIS 1014, at *5 (N.D. Ill. 1998)(unpublished), aff’d, 216 F.3d 645 (7th Cir.), cert. denied, 531 U.S. 1014 (2000) (Noting “the Fourth Amendment reasonableness standard applies to any resulting searches and the law of the foreign country must be consulted to determine the reasonableness of such searches”).

- (2) **Compliance With Foreign Law is Dispositive On Issue of Reasonableness.** The Ninth Circuit Court of Appeals has determined that “compliance with foreign law alone determines whether the search violated the Fourth Amendment.” Barona, 56 F.3d at 1092. See also Peterson, 812 F.2d at 491 (Noting that “local law of the [foreign country] governs whether the search was reasonable ...”); United States v. Juda, 46 F.3d 961, 968 (9th Cir.), cert. denied, 515 U.S. 1169 (1995) (Noting that the “Fourth Amendment’s reasonableness standard applies to United States officials conducting a search affecting a United States citizen in a foreign country,” and that “a foreign search is reasonable if it conforms to the requirements of foreign law”)(internal citations omitted).

NOTE: “If foreign law was not complied with, a search may be upheld under the good faith exception to the exclusionary rule when United States officials reasonably rely on foreign officials’ representations of foreign law.” *Federal Narcotics Prosecutions*, 2d Ed., Office of Legal Education, Department of Justice, at 1119. See, e.g., Juda, 46 F.3d at 968; Peterson, 812 F.2d at 492 (“The good faith exception is grounded in the realization that the exclusionary rule does not function as a deterrent in cases in which the law enforcement officers acted on a reasonable belief that their conduct was legal. ... We conclude that the reasoning applies as well to reliance on foreign law enforcement officers’ representations that there has been compliance with their own law”).

- e. **The Exclusionary Rule Does Not Apply to Evidence That Would Have Been “Inevitably” Discovered.** “If the prosecution can establish by a preponderance of the evidence that ... information ultimately or inevitably would have been discovered by lawful means ... then the deterrence rationale has so little basis that the evidence should be received.” Nix v. Williams, 467 U.S. 431, 444 (1984). This has become known as the “inevitable discovery” exception to the exclusionary rule. See, e.g., United States v. Scott, 270 F.3d 30, 42 (1st Cir. 2001), cert. denied, 535 U.S. 1007 (2002)(Noting one exception to the exclusionary rule is “the inevitable discovery exception,” which “applies to any case in which the prosecution can show by a preponderance of the evidence that the government would have discovered the challenged evidence even had the constitutional violation to which the defendant objects never occurred”).
- 1) **Rationale for the Rule.** “The inevitable discovery doctrine is based on the same rationale as the independent source doctrine - that ‘the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been if no police error or misconduct had occurred.’” United States v. Larsen, 127 F.3d 984, 986 (10th Cir. 1997), cert. denied, 522 U.S. 1140 (1998)(citation omitted).
 - 2) **Courts Are Split on Whether an Investigation was Ongoing at the Time of the Constitutional Violation.** The circuit courts of appeal are split on whether the “inevitable discovery” exception requires that law enforcement officers were actively pursuing an alternative investigation at the time the constitutional violation occurred. To state the issue differently, courts are split on the following: “At the time one officer is engaged in a search violative of the Fourth Amendment, must another officer have already set in motion an independent and lawful inquiry that would have led to the discovery of the same evidence?” Stephen E. Hessler, Note, Establishing Inevitability Without Active Pursuit: Defining the Inevitable Discovery Exception to the Fourth Amendment Exclusionary Rule, 99 Mich. L. Rev. 238, 243 (2000).

- a) **Some Courts Require That Law Enforcement Be Actively Engaged in an Alternative Investigation for the Exception to Apply.** Some federal courts require the government to be actively involved in an independent investigation that would have “inevitably” resulted in the discovery of the evidence. See e.g., United States v. Villalba-Alvarado, 345 F.3d 1007, 1019 (8th Cir. 2003) (Noting first element of “inevitable discovery” is that “there must be an ongoing line of investigation that is distinct from the impermissible or unlawful technique”); United States v. Lamas, 930 F.2d 1099, 1102 (5th Cir. 1991) (Noting that, for exception to apply, the government must show, *inter alia*, that they were “actively pursuing a ‘substantial alternate line of investigation at the time of the constitutional violation’”)(citation omitted); United States v. Wilson, 36 F.3d 1298, 1304 (5th Cir. 1994)(same); United States v. Eng, 971 F.2d 854, 681 (2d Cir. 1992)(Agreeing with Fifth Circuit’s holding that “the alternate means of obtaining the evidence must at least be in existence and, at least to some degree, imminent, if yet unrealized”); . In so holding, these courts seem to seize upon language in Justice Brennan’s dissent in Nix. See Nix, 467 U.S. at 459 (Brennan, J., dissenting)(Noting the majority concluded “that unconstitutionally obtained evidence may be admitted at trial if it inevitably would have been discovered in the same condition by an independent line of investigation that was already being pursued when the constitutional violation occurred”).

- b) **Alternatively, Some Courts Do Not Require That an Active Investigation Be Underway for the Exception to Apply.** On the other hand, some federal courts have found that the “inevitable discovery exception applies whenever an independent investigation inevitably would have led to discovery of the evidence, whether or not the investigation was ongoing at the time of the illegal police conduct.” United States v. Souza, 223 F.3d 1197, 1203 (10th Cir. 2000). *See also* United States v. Ford, 22 F.3d 374, 377 (1st Cir.), *cert. denied*, 513 U.S. 900 (1994)(noting court had previously declined an “ongoing investigation” requirement)[*citing* United States v. Silvestri, 787 F.2d 736, 746 (1st Cir. 1986), *cert. denied*, 487 U.S. 1233 (1988)]; United States v. Thomas, 955 F.2d 207, 210 (4th Cir. 1992); United States v. Kennedy, 61 F.3d 494, 499-500 (6th Cir. 1995), *cert. denied*, 517 U.S. 1119 (1996)(“Therefore, we hold that an alternate, independent line of investigation is not required for the inevitable discovery exception to apply”); United States v. Boatwright, 822 F.2d 862, 864 (9th Cir. 1987) (“The existence of two independent investigations at the time of discovery is not, therefore, a necessary predicate to the inevitable discovery exception”).

In two more recent decisions, the Sixth Circuit Court of Appeals has ignored the reasoning of Kennedy, *supra*, and required “the government to proffer clear evidence ‘of an independent, untainted investigation that inevitably would have uncovered the same evidence’ as that discovered through the illegal search.” United States v. Dice, 200 F.3d 978, 986 (6th Cir. 2000). *See also* United States v. Haddix, 239 F.3d 766, 679 (6th Cir. 2001). This is contrary to Sixth Circuit rules, however, which require an “en banc” decision to overrule a published opinion. Accordingly, Kennedy is still considered to be the law of the Sixth Circuit on this issue.

- f. **The Exclusionary Rule Does Not Apply to Deportation Proceedings.** The exclusionary rule does not apply to deportation proceedings. INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984).

- g. **The Exclusionary Rule Does Not Apply to Grand Jury Proceedings.** The exclusionary rule does not apply to grand jury proceedings. United States v. Calandra, 414 U.S. 338, 354 (1974).
- h. **The Exclusionary Rule Does Not Apply to Sentencing Proceedings.** The exclusionary rule does not apply during sentencing proceedings. See, e.g., United States v. Torres, 926 F.2d 321, 325 (3d Cir. 1991) (“We hold, therefore, that evidence suppressed as in violation of the Fourth Amendment may be considered in determining appropriate guideline ranges”); United States v. Brimah, 214 F.3d 854, 859 (7th Cir. 2000) (“We join the other circuits who have considered this issue and hold that the exclusionary rule does not bar the consideration at sentencing of evidence seized in violation of the Fourth Amendment”).
- i. **The Exclusionary Rule Does Not Apply to Civil Tax Proceedings.** The exclusionary rule does not apply to civil tax proceedings. United States v. Janis, 428 U.S. 433, 454 (1976) (“We conclude that exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion”).

H. **EPO #8: IDENTIFY THE LIMITATIONS OF AN ARREST WARRANT**

- 1. **General Rule – There Are a Variety of Ways in Which Federal Arrest Warrants May Be Obtained.** Within the federal system, arrest warrants may be obtained through a variety of different mediums, including:
 - a. **Criminal Complaints;**
 - b. **Grand Jury Indictments; and**
 - c. **Informations.**
- 2. **The Rules Regarding the Form and Issuance of Arrest Warrants are Contained in the Federal Rules of Criminal Procedure.** The rules regarding the form and issuance of federal arrest warrants are contained in two Rules 4 and 9 of the Federal Rules of Criminal Procedure.
 - a. **Arrest Warrant Upon Complaint.** Rule 4 of the Federal Rules of Criminal Procedure addresses the issuance of federal arrest warrants based upon a complaint. Subsection (a) of the rule provides, in pertinent part, that “if the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it.” As used in this rule, a “complaint” is defined by Rule 3 as “a written statement of the essential facts constituting the offense charged. It must be made under oath before a magistrate judge or, if none is reasonably available, before a state or local judicial officer.”

- b. **Arrest Warrant Upon Indictment or Information.** Rule 9 of the Federal Rules of Criminal Procedure addresses the issuance of federal arrest warrants based upon an indictment or information. Subsection (a) of the rule provides, in pertinent part, that “the court must issue a warrant - or at the government’s request, a summons - for each defendant named in an indictment or named in an information if one or more affidavits accompanying the information establish probable cause to believe that an offense has been committed and that the defendant committed it.” Further, “the court may issue more than one warrant or summons for the same defendant.”
- 3. **The Form of the Warrant.** Rule 4(b)(1) describes the form that a federal arrest warrant based upon a complaint must take. When the warrant is based upon an indictment or information, it “must conform to Rule 4(b)(1),” Rule 9(b)(1), with certain exceptions, noted below. Specifically, a federal arrest warrant must contain the following:
 - a. **Signature of Magistrate Judge.** First, the warrant must be “signed by the magistrate judge.” For arrest warrants based upon an indictment or information, the warrant “must be signed by the clerk.” Rule 9(b)(1).
 - b. **Name of the Defendant.** Second, the warrant must “contain the defendant’s name or, if it is unknown, a name or description by which the defendant can be identified with reasonable certainty.”
 - c. **Offense Charged.** Third, the warrant must “describe the offense charged in the complaint.” For arrest warrants based upon an indictment or information, the warrant “must describe the offense charged in the indictment or information.” Rule 9(b)(1).
 - d. **Command to Arrest.** Finally, the warrant must “command that the defendant be arrested and brought without unnecessary delay before a magistrate judge or, if none is reasonably available, before a state or local judicial officer.”
- 4. **The Execution of the Warrant.** Rule 4(c) describes the manner in which arrest warrants based upon a complaint must be executed. When the warrant is based upon an indictment or information, “the warrant must be executed ... as provided in Rule 4(c)(1), (2), and (3).” Rule 9(c)(1)(A).
 - a. **Who Can Execute?** Rule 4(c)(1) provides that “only a marshal or other authorized officer may execute a warrant.”
 - b. **Territorial Limits.** Rule 4(c)(2) provides, that an arrest warrant “may be executed ... within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest.”

- c. **Time Limits.** “Unlike a search warrant, an arrest warrant typically does not require execution within a specified time period or ‘forthwith.’” United States v. Watson, 423 U.S. 411, 452 n.16 (1976)(Marshall, J., dissenting). See also United States v. Jones, 377 F.3d 1313, 1314 (11th Cir. 2004)(“Although the officer did not serve the warrant immediately upon his discovery of it, delay in executing [an arrest] warrant is not itself unlawful”); United States v. Cravero, 545 F.2d 406, 413 (5th Cir. 1976)(“[A] suspect has no constitutional right to be arrested earlier than the police choose”).
- d. **Manner of Execution.** Rule 4(c)(3)(A) provides, in pertinent part, that “a warrant is executed by arresting the defendant.”
- 1) **Upon Arrest, Officer Must Show the Warrant to the Defendant.** “Upon arrest, an officer possessing the warrant must show it to the defendant.” Rule 4(c)(3)(A).
 - 2) **However, the Arresting Officer Need Not Have a Copy of the Warrant at the Time of Arrest.** There is no requirement, however, that an officer have the warrant present at the time of the arrest. Specifically, Rule 4(c)(3)(A) provides that, “If the officer does not possess the warrant, the officer must inform the defendant of the warrant’s existence and of the offense charged and, at the defendant’s request, must show the warrant to the defendant as soon as possible.” See United States v. \$ 64,000.00 in United States Currency, 722 F.2d 239, 244 (5th Cir. 1984)(“The officer need not have the warrant in his possession, though ‘upon request’ he shall show it to the defendant ‘as soon as possible’”); United States v. Buckner, 717 F.2d 297, 301 (6th Cir. 1983)(“ The fact that the officers did not have the arrest warrant in hand is of no consequence”); United States v. George, 625 F.2d 1081, 1086 (3rd Cir. 1980)(“Even in cases where an arrest warrant has actually been issued, the arresting officer is not required to have it in his possession”).

- 3) **Some Courts Hold That An Arrest Warrant Compels Arresting the Defendant.** Some courts have held that, “once an arrest warrant has been issued, the warrant “compels arrest and, unless it is retracted by the court, the arresting officer who chooses to ignore its command operates at some personal risk.” Benjamin v. United States, 554 F. Supp. 82, 86 (E.D.N.Y. 1982)(*citing* Title 18 U.S.C. § 755, “Officer Permitting Escape”). See also Rodriguez v. United States, 847 F. Supp. 231, 235 (D.P.R. 1993), *aff’d*, 54 F.3d 41 (1st Cir. 1995)[“Had the officers not arrested Rodriguez, who they reasonably believed was the subject on the arrest warrant, and had she fled the jurisdiction, criminal charges could have been brought against the Deputy Marshals, pursuant to 18 U.S.C. § 755, for failure to comply with their duty under [Rule 4(c)(3)(A)]” (internal footnote and citation omitted). Alternatively, some courts have noted that “law enforcement officials are under no constitutional duty to terminate a criminal investigation the moment they have an arrest warrant in their hands.” United States v. Toro, 840 F.2d 1221, 1233 (5th Cir. 1988).

5. **Return of the Warrant.** Both Rule 4 and Rule 9 provide for a return of the arrest warrant.

- a. **Rule 4(c)(4)(A).** When an individual is arrested based upon a warrant issued upon a complaint, Rule 4(c)(4)(A) provides for a return of that warrant. Specifically, the rule states: “After executing a warrant, the officer must return it to the judge before whom the defendant is brought in accordance with Rule 5. At the request of an attorney for the government, an unexecuted warrant must be brought back to and canceled by a magistrate judge or, if none is reasonably available, by a state or local judicial officer.”
- b. **Rule 9(c)(2).** When an individual is arrested based upon a warrant issued upon an indictment or information, Rule 9(c)(2) provides the warrant “must be returned in accordance with Rule 4(c)(4).”

I. **EPO #9: IDENTIFY WHEN AN ARREST INVOLVING A FELONY REQUIRES THE USE OF A WARRANT**

1. **General Rule – A Law Enforcement Officer May Make A Warrantless Arrest For a Felony Offense Upon Probable Cause.** “The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony....” Carroll v. United States, 267 U.S. 132, 156 (1925). However, this rule is not without limitations, as discussed below.

2. **An Officer With Probable Cause May Make a Warrantless Arrest for Felony Offenses in a Public Place.** Where a law enforcement officer has probable cause to believe that a suspect located in a public place has committed a felony offense, the officer may make a warrantless arrest of the individual. See Carroll v. United States, 267 U.S. 132, 156 (1925) ("The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony...."); United States v. Dickey-Bey, 393 F.3d 449, 453 (4th Cir. 2004) ("It is well-settled under Fourth Amendment jurisprudence that a police officer may lawfully arrest an individual in a public place without a warrant if the officer has probable cause to believe that the individual has committed, is committing, or is about to commit a crime"); Sparing v. Village of Olympia Fields, 266 F.3d 684, 688 (7th Cir. 2001) ("Police officers may constitutionally arrest an individual in a public place (e.g., outside) without a warrant, if they have probable cause")(citation omitted); United States v. Goddard, 312 F.3d 1360, 1362 (11th Cir. 2002), cert. denied, 538 U.S. 969 (2003) ("The Fourth Amendment permits warrantless arrests in public places where an officer has probable to believe that a felony has occurred"). In United States v. Watson, 423 U.S. 411, 418 (1976), the Supreme Court emphasized that the Fourth Amendment incorporated "the ancient common law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in this presence if there was reasonable grounds for making the arrest."
3. **Entering an Arrestee's Home to Make an Arrest.** "It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" Welsh v. Wisconsin, 466 U.S. 740, 748 (1984). See also Payton v. New York, 445 U.S. 573, 590 (1980) ("The common law maxim 'every man's house is his castle' is part of our Fourth Amendment jurisprudence prohibiting unreasonable searches and seizures"). For that reason, arresting a person in his home without a warrant is "normally a violation of the Fourth Amendment, even if there is probable cause to arrest" the person. Hadley v. Williams, 368 F.3d 747, 749 (7th Cir. 2004).
 - a. **Warrantless Entries Into a Home Are Presumptively Unreasonable.** Accordingly, "a search of the home without a warrant is a well-settled violation of the Fourth Amendment, and the Supreme Court in Payton simply made clear that it is no less so when the search is conducted in order to seize (i.e., by an arrest) a person, rather than property." Sparing, 266 F.3d at 689 (citation omitted). See also Payton, 445 U.S. at 586 ("It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable"); United States v. Leverington, 397 F. 3d 1112, 1114 (8th Cir. 2005) ("The Fourth Amendment generally prohibits entry to a home without a warrant, unless the circumstances meet an established exception to the warrant requirement ...").

b. **Forcing a Subject Outside is the Same as an Entry by LEOs.** The location of the arrested person, and not the arresting agents, determines whether an arrest occurs in-house or in a public place. If the police force a person out of his house to arrest him, the arrest has taken place inside the home. Fisher v. City of San Jose, 475 F.3d 1049 (9th Cir. 2007).

c. **Entries Into a Home to Make an Arrest Require a Warrant, Consent, or Exigent Circumstances.** In order to enter a person's home to make an arrest, a law enforcement officer must have.

- 1) **A Warrant;**
- 2) **Consent;** or
- 3) **Exigent Circumstances.**

Payton, 445 U.S. at 588, 589 ("To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when it is clearly established under statutory authority and when probable cause is clearly present")(citation omitted).

NOTE: Recall that, for Fourth Amendment purposes, a hotel room is treated essentially the same, if not exactly the same, as a home. For that reason, "police officers may only gain visual access to a hotel room if (1) the room's occupant voluntarily opens the hotel room door in response to a request (but not a threat or a command), (2) the officers have a warrant, or (3) the officers have probable cause and one of the exceptions to the warrant requirement exists." United States v. Washington, 387 F.3d 1060, 1070 (9th Cir. 2004).

d. **Arrest Warrants Allow Officers to Enter the Arrestee's Home to Make an Arrest When There is Reason to Believe the Suspect is Inside.**

"For Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives *when there is reason to believe the suspect is within.*" Payton, 445 U.S. at 603 (emphasis added). See also United States v. Powell, 379 F.3d 520, 523 (8th Cir. 2004)(Noting "that police do not need a search warrant to enter the home of the subject of an arrest warrant in order to effectuate the arrest")(citation omitted).

"Because an arrest warrant authorizes the police to deprive a person of his liberty, it necessarily also authorizes a limited invasion of that person's privacy interest when it is necessary to arrest him in his home." Steagald v. United States, 451 U.S. 204, 214 n.7 (1981).

- 1) **An Officer Must Have “Reason to Believe” That (a) the Suspect Lives at the Residence and (b) is in the Residence at the Time of Entry.** To enter a residence with an arrest warrant, an officer must meet two basic requirements. “A valid arrest warrant carries with it the authority to enter the residence of the person named in the warrant in order to execute the warrant” so long as the police have:
 - a) **A reasonable belief that the suspect resides at the place to be entered, and**
 - b) **A reasonable belief that he is currently present in the dwelling.** See United States v. Clayton, 210 F.3d 841, 843 (8th Cir. 2000)(citation omitted)(emphasis added); United States v. Magluta, 44 F.3d 1530, 1535 (11th Cir.), cert. denied, 516 U.S. 869 (1995)(Officers must have “a reasonable belief that the location to be searched is the suspect’s dwelling, and that the suspect is within the residence at the time of entry”); Valdez v. McPheters, 172 F.3d 1220, 1224 (10th Cir. 1999)(“[P]olice officers entering a residence pursuant to an arrest warrant must demonstrate (1) a reasonable belief that the arrestee lived in the residence, and (2) a reasonable belief that the arrestee could be found within the residence at the time of the entry”); United States v. Barrera, 464 F.3d 496 (5th Cir 2006) (reviewing factors officers may use to develop a reasonable belief that a suspect resides in a particular location, including an address provided to a bail bondsman or creditors, customer lists for utility services, vehicle registration records, reports of neighbors or commercial delivery employees, surveillance, and information from parole officers).

NOTE: Of course, “[t]he officers’ assessment need not in fact be correct; rather, they need only reasonably believe that the suspect resides at the dwelling to be searched and is currently present at the dwelling.” Powell, 379 F.3d at 523 (citation omitted).

- 2) **Courts are Split on Whether “Reason to Believe” Means the Same or Something Less Than “Probable Cause.”** In order to enter a residence with an arrest warrant to effect an arrest, a law enforcement officer must have “reason to believe the suspect is within.” What exactly is meant by the phrase “reason to believe” is an open question, and has resulted in a split among the federal circuits.

- a) **The Majority View.** A majority of the circuits hold that “reason to believe” is a lesser standard than probable cause. *See, e.g., United States v. Route*, 104 F.3d 59, 62 (5th Cir.), cert. denied, 521 U.S. 1109 (1997)(“To the extent that this court has not already done so ... we adopt today the ‘reasonable belief’ standard of the Second, Third, Eighth, and Eleventh Circuits”)(footnotes omitted); *Valdez*, 172 F.3d at 1227 n.5 (“While probable cause itself is a relatively low threshold of proof, it is a higher standard than ‘reasonable belief,’ which is, as everyone agrees, the appropriate standard”)(citation omitted).
- b) **The Minority View.** However, the Ninth Circuit Court of Appeals has held that the “reason to believe” standard “should be read to entail the same protection and reasonableness inherent in probable cause.” *See, e.g., United States v. Diaz*, 491 F.3d 1074 (9th Cir. 2007); *United States v. Gorman*, 314 F.3d 1105, 1110 (9th Cir. 2002). The Third Circuit Court of Appeals has also suggested that “reason to believe” is synonymous with probable cause. *See United States v. Agnew*, 385 F.3d 388 (3rd Cir. 2004), *vacated on other grounds and remanded for resentencing by Agnew v. United States*, 543 U.S. 1136 (U.S. 2005) (Noting that, pursuant to *Payton*, “police may enter a suspect’s residence to make an arrest armed only with an arrest warrant if they have **probable cause** to believe that the suspect is in the home”)(emphasis added). The Sixth Circuit has expressly avoided deciding the issue. *United States v. Hardin*, 2008 U.S. App. LEXIS 18135 (6th Cir. 2008) (holding that the language addressing this question in its two prior cases, *United States v. Jones*, 641 F.2d 425 (6th Cir. 1981), and *United States v. Pruitt*, 458 F.3d 477 (6th Cir. 2006), was dicta and not controlling, and refusing to set a standard).
- 3) **Courts Rely Upon Various Factors to Indicate Presence Inside the Home.** “Courts ‘must be sensitive to common sense factors indicating a resident’s presence.’” *Valdez*, 172 F.3d at 1226. “Indeed, the officers may take into account the fact that a person involved in criminal activity may be attempting to conceal his whereabouts.” *Id.* (citation omitted). In determining a suspect’s presence in the home, a law enforcement officer may consider the following factors:
- a) **Surveillance Indicating the Suspect is in the Residence.** However, “direct surveillance or the actual viewing of the suspect on the premises is not required.” *Id. (citing Magluta*, 44 F.3d at 1535, 1538);

- b) **The Presence of the Suspect's Automobile**, which may indicate his presence, Valdez, 172 F.3d at 1226 (citation omitted); United States v. Bervaldi, 226 F.3d 1256, 1264 (11th Cir. 2000) (Presence of suspect's automobile was an important fact in establishing his presence in home);
 - c) **The Time of Day**, United States v. Terry, 702 F.2d 299, 319 (2d Cir.), cert. denied, 461 U.S. 931 (1983) (reasonable to believe suspect would be at home at 8:45 a.m. on Sunday morning);
 - d) **Observing the Operation of Lights or Other Electrical Devices**, Route, 104 F.3d at 63 (officers heard television set left on inside residence after third person left residence); Magluta, 44 F.3d at 1538 (observations that "the lawn was manicured and a porch light was on" gave "no indication that Magluta departed, such as for work or the like");
 - e) **The Circumstances of a Suspect's Employment**, United States v. Lauter, 57 F.3d 212, 215 (2d Cir. 1995)(officer's conduct reasonable since they knew the suspect "was unemployed and typically slept late");
 - f) **Tips From Citizens**, United States v. Boyd, 180 F.3d 967, 978 (8th Cir. 1999)(Officer reasonably believed that suspect was home based on confidential informant's assertion, corroborated by police observation of a car appearing to be the defendant's and observing that the hood of defendant's girlfriend's car was warm, that defendant had arrived there);
 - g) **A Lack of Evidence That the Suspect is Elsewhere**, see Terry, 702 F.2d at 319 (one factor in supporting reasonableness was twelve-year-old son's failure to indicate father was not inside).
- 4) "No single factor is, of course, dispositive. Rather, the court must look at all of the circumstances present in the case to determine whether the officers entering the residence had a reasonable belief that the suspect resided there and would be found within." Valdez, 172 F.3d at 1226. See, e.g., United States v. Smith, 363 F.3d 811, 814-15 (8th Cir. 2004), *vacated on other grounds and remanded for resentencing by Smith v. United States*, 543 U.S. 1103 (2005), (Totality of the circumstances supported reasonable belief suspect was in home where (a) towel covering window moved; (b) baby was crying inside the apartment; (c) suspect was known to have been in the apartment during the morning hours on two earlier occasions; and (d) officers knew suspect usually did not answer the door after repeated knocking).

4. **To Arrest a Suspect in a Third Party's Residence, a Warrant, Consent, or Exigent Circumstances Must Exist.** In Steagald v. United States, 451 U.S. 204 (1981), the Supreme Court addressed “whether, under the Fourth Amendment, a law enforcement officer may legally search for the subject of an arrest warrant in the home of a third party without first obtaining a search warrant.” Id. at 205. In sum, the Court held that a law enforcement officer could not enter the home of a third party to affect an arrest unless he has:

- a. **A Search Warrant;**
- b. **Exigent Circumstances; or**
- c. **Consent of the Third Party Homeowner.**

Id. While the arrest warrant may protect the arrestee from an unreasonable seizure, “it [does] absolutely nothing to protect [the homeowner’s] privacy interest in being free from an unreasonable invasion and search of his home.” Id. at 213. Similarly, though an arrest warrant necessarily allows for entry into the home of the person named in the warrant to affect an arrest, “this analysis ... is plainly inapplicable when the police seek to use an arrest warrant as legal authority to enter the home of a third party to conduct a search. Such a warrant embodies no judicial determination whatsoever regarding the person whose home is to be searched.” Id. at 214. See also Minnesota v. Carter, 525 U.S. 83, 100 (1998) (Kennedy, J., concurring)(“Absent exigent circumstances or consent, the police cannot search for the subject of an arrest warrant in the home of a third party, without first obtaining a search warrant directing entry”); United States v. Lovelock, 170 F.3d 339, 344 (2d Cir.), *cert. denied*, 528 U.S. 853 (1999)(“The principle discussed in Payton, allowing officers to enter the residence of the suspect named in the arrest warrant, does not authorize entry into a residence in which the officers do not believe the suspect is residing but believe he is merely visiting”).

NOTE: Of course, “[i]f the suspect is a co-resident of the third-party, then Steagald does not apply, and Payton allows both arrest of the subject of the arrest warrant and use of evidence found against the third party.” United States v. Risse, 83 F.3d 212, 216 (8th Cir. 1996)(citations and internal quotation marks omitted).

J. EPO #10: IDENTIFY WHEN AN ARREST INVOLVING A MISDEMEANOR REQUIRES THE USE OF A WARRANT

1. **General Rule – A Law Enforcement Officer May Make A Warrantless Arrest in Public For a Misdemeanor Offense if the Crime was Committed “In the Officer’s Presence.”** “If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.” *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). This is consistent with the ancient common law rule that “a peace officer was permitted to arrest without a warrant for a misdemeanor ... committed in his presence....” *United States v. Watson*, 423 U.S. 411, 418 (1976). See also *Carroll*, 267 U.S. at 156-157 (“The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony, and that he may only arrest without a warrant one guilty of a misdemeanor if committed in his presence”).
2. **The Requirement the Offense Occur “In the Officer’s Presence.”** “The United States Constitution does not require a warrant for misdemeanors not occurring in the presence of the arresting officer.” *Fields v. South Houston*, 922 F.2d 1183, 1189 (5th Cir. 1991). See also *Barry v. Fowler*, 902 F.2d 770, 772 (9th Cir. 1990) (“The requirement that a misdemeanor must have occurred in the officer’s presence to justify a warrantless arrest is not grounded in the Fourth Amendment”). Further, “the Supreme Court has never held that a police officer violates the Fourth Amendment merely by arresting someone without a warrant for a misdemeanor offense which did not occur in the officer’s presence and/or did not involve a breach of the peace. Rather, when determining the constitutionality of a warrantless arrest for a criminal offense, the Court has repeatedly focused its inquiry on the existence of probable cause for the arrest.” *Woods v. City of Chicago*, 234 F.3d 979, 992 (7th Cir. 2000), *cert. denied*, 534 U.S. 955 (2001). Thus, even when a statutory violation has occurred (e.g., a violation of a state statute requiring “in the presence”), no Fourth Amendment violation will be found unless probable cause for the arrest did not exist. See, e.g., *Vargas-Badillo v. Diaz-Torres*, 114 F.3d 3, 6 (1st Cir. 1997); *Pyles v. Raisor*, 60 F.3d 1211, 1215 (6th Cir. 1995); *Scott v. District of Columbia*, 101 F.3d 748, 754 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1231 (1997); *Fields, supra*; *Barry, supra*.
3. **Most Federal Statutory Arrest Authority Incorporates the “In the Presence” Requirement.** Nonetheless, the “in the presence” requirement has been incorporated into the vast majority of statutes providing federal law enforcement officers with arrest authority. See, e.g., Title 18 U.S.C. § 3053 (U.S. Marshals Service); Title 18 U.S.C. § 3056 (U.S. Secret Service); Title 19 U.S.C. § 1589a (U.S. Customs Service); Title 26 U.S.C. § 7608 (Internal Revenue Service).

4. **What Does “In the Presence” Mean?** Generally speaking, an “officer has probable cause to believe a misdemeanor is taking place in his presence ‘when the facts and circumstances as observed by the officer through the officer’s senses are sufficient to warrant an officer of reasonable caution to believe that an offense is occurring.’” Tanberg v. Sholtis, 401 F.3d 1151, 1157 (10th Cir. 2005)(citation omitted).
5. **Examples of “In the Presence.”** Because the “in the presence” limitation for misdemeanor offenses appears with some frequency, examples of what that phrase means are helpful.
 - a. **Officer is the Victim.** So, for example, where the officer making the arrest was the actual victim of the crime, such as an assault, the “in the presence” requirement is met. See, e.g., Hoover v. Garfield Heights Municipal Court, 802 F.2d 168, 172 (6th Cir. 1986), cert. denied, 480 U.S. 949 (1987) (Where officer was assaulted, “the offense obviously was committed in the presence of a police officer and there was a reasonable ground for [the suspect’s] arrest”).
 - b. **Officer Establishes Probable Crime Offense Being Committed.** “The presence requirement ... allow[s] arrest where the facts confronting an officer give him probable cause to believe that the offense is being committed. An officer may draw reasonable inferences from the immediate observations of his senses.” United States v. Miller, 589 F.2d 1117, 1128 (1st Cir. 1978), cert. denied, 440 U.S. 958 (1979).
6. **To Enter an Arrestee’s Home to Make an Arrest, an Officer Must Have a Warrant, Consent, or Exigent Circumstances.** As with a felony offense, in order to enter a person’s home to make an arrest, a law enforcement officer must have (1) a warrant; (2) consent; or (3) exigent circumstances. Payton, 445 U.S. at 588, 589.

K. **EPO #11: IDENTIFY THE CONDITIONS UNDER WHICH AN OFFICER MAY USE FORCE TO EXECUTE A WARRANT (SEARCH OR ARREST) ACCORDING TO THE PROVISIONS OF TITLE 18 U.S.C. § 3109**

1. **General Rule - Before Entering a Dwelling to Serve Warrants, Officers Must Comply with Title 18 U.S.C. § 3109.** “The Fourth Amendment says nothing specific about formalities in exercising a warrant’s authorization, speaking to the manner of searching as well as to the legitimacy of searching at all simply in terms of the right to be ‘secure ... against unreasonable searches and seizures.’” United States v. Banks, 540 U.S. 31, 35 (2003). In terms of executing warrants in dwellings, Title 18 U.S.C. § 3109 announces the Federal “knock and announce” rule. In sum, the statute provides that, “[p]olice acting under a warrant usually are required to announce their presence and purpose, including by knocking, before attempting forcible entry, unless circumstances exist which render such an announcement unreasonable.” United States v. Sargent, 319 F.3d 4, 8 (1st Cir. 2003). “Failure to knock and announce prior to forcibly entering a location to execute a search warrant, absent exigent circumstances, is unreasonable under the Fourth Amendment.” United States v. Smith, 386 F.3d 753, 758 (6th Cir. 2004). See also Wilson v. Arkansas, 514 U.S. 927, 934 (1995). Of course, during the execution of search or arrest warrants, a law enforcement officer may obtain consent to gain entry into particular premises. However, where consent is not a viable option for law enforcement officers, forced entry may be required. In sum, there are two (2) situations in which a law enforcement officer may use force to gain entry to execute a search or arrest warrant:
 - a. **Title 18 U.S.C. § 3109 is the Federal “Knock and Announce” Statute.** Title 18 U.S.C. § 3109 codified the common law “knock and announce” requirements, and requires that officers executing search or arrest warrants must, unless their entry is consented to, give notice of their authority and purpose and be refused entry before they can break into the premises to be searched.
 - b. **Compliance with § 3109 May Be Excused When Exigent Circumstances Exist.** When exigent circumstances exist, compliance with the notice requirements of § 3109 may be excused, and force may be used to enter a home. These exigent circumstances are “exceptions” to the § 3109.
2. **The Statute.** Title 18 U.S.C. § 3109 is the Federal “knock and announce” statute. Titled “Breaking Doors or Windows for Entry or Exit,” the statute provides as follows:

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

3. **Section 3109 Applies to Both Search and Arrest Warrants.** While the plain language of the statute appears to limit its application to the execution of search warrants, § 3109 has been made applicable to the execution of arrest warrants by case law. See Miller v. United States, 357 U.S. 301 (1958) ("The requirement stated in Semayne's Case still obtains. It is reflected in Title 18 U. S. C. § 3109, in the statutes of a large number of States, and in the American Law Institute's proposed Code of Criminal Procedure, § 28. It applies, as the Government here concedes, whether the arrest is to be made by virtue of a warrant, or when officers are authorized to make an arrest for a felony without a warrant"); United States v. Rivers, 1996 U.S. App. LEXIS 33678 (9th Cir. 1996) (In case involving arrest of defendant in his own home with an arrest warrant, court noted that "section 3109 applies to the execution of arrest warrants as well as search warrants"); United States v. Maden, 64 F.3d 1505 (10th Cir. 1995) (In case involving arrest of defendant in his apartment with an arrest warrant, court noted that "section 3109 applies when officials attempt to enter a house to execute an arrest warrant"); United States v. Nolan, 718 F.2d 589 (3rd Cir. 1983) (Holding that "section 3109 has been interpreted to apply to breakings pursuant to arrest warrants as well as search warrants"); United States v. Reyes, 922 F. Supp. 818 (S.D.N.Y. 1996) (Holding that "section 3109 has been held to apply to arrest warrants," citing Sabbath v. United States, 391 U.S. 585 (1968)); United States v. Gilbert, 829 F. Supp. 900 (E.D. Mich. 1993) (Holding that, "while § 3109 reads as if it only applies to search warrants, 'there is no doubt that this statute's requirements (although applicable in terms only to search warrants) apply to forcible entry to a home when officers seek to make an arrest of a person either on arrest warrant or on probable cause'"); United States v. Reed, 810 F. Supp. 1078 (D. Alaska 1992) (Noting that "18 U.S.C. § 3109 governs the service of search and, by extension, arrest warrants by federal agents"); and United States v. Ross, 1995 U.S. App. LEXIS 9955 (6th Cir. 1995) (Holding that "the 'knock and announce' statute requires officers to announce their authority and purpose and be refused admittance before breaking into a house to execute a search or arrest warrant").
4. **Section 3109 has Three Primary Purposes.** The requirement to "knock and announce" under § 3109 has three primary purposes:
- a. The reduction of the potential for violence to both the police officer and the occupants of the house into which entry is sought;
 - b. The needless destruction of private property; and
 - c. A recognition of the individual's right of privacy in his house.

See Smith, 386 F.3d at 758 (“The knock-and-announce rule: 1) reduces the potential for violence to both the police officers and the occupants of the house into which entry is sought; 2) curbs the needless destruction of private property; and 3) protects the individual’s right to privacy in his or her house”)(internal quotation marks and citation omitted); United States v. Dunnock, 295 F.3d 431, 434 (4th Cir.), cert. denied, 537 U.S. 1037 (2002)(Noting “knock and announce” requirement “serves three purposes: (1) protecting the safety of occupants of a dwelling and the police by reducing violence; (2) preventing the destruction of property; and (3) protecting the privacy of occupants”)(citation omitted); United States v. Brown, 52 F.3d 415, 421 (2d Cir. 1995), cert. denied, 516 U.S. 1068 (1996).

5. **The Circuits are Split as to Whether § 3109 Applies to Buildings Other Than Dwellings.** There is currently a split among the circuits as to whether § 3109 applies only to dwellings. The majority of circuits hold that the requirements of the statute are inapplicable when a warrant is being served at a commercial premise. See, e.g., United States v. Lopez, 898 F.2d 1505 (11th Cir. 1990)(“Section 3109 applies only to a house and its curtilage, and does not apply to commercial buildings”)(citation omitted); United States v. Francis, 646 F.2d 251, 256 (6th Cir.), cert. denied, 454 U.S. 1082 (1981)(“We continue to restrict the application of § 3109 to dwellings and buildings within the curtilage, the extent of the rule as it existed at common law”); United States v. Agrusa, 541 F.2d 690, 700 (8th Cir. 1976), cert. denied, 429 U.S. 1045 (1977); United States v. Johns, 466 F.2d 1364, 1365 (5th Cir. 1972). However, two circuits do require compliance with § 3109 at a commercial premise. United States v. Case, 435 F.2d 766, 770 n.1 (7th Cir. 1970)(“Although § 3109 literally applies only to ‘houses,’ it, like the Fourth Amendment itself which refers to houses, has been held to include commercial establishments”); United States v. Phillips, 497 F.2d 1131, 1133-1134 (9th Cir. 1974).
6. **Officers are Not Required to “Knock and Announce” When No One is Home.** When law enforcement officers are aware that no one is present during the execution of a search or arrest warrant, they are not required to “knock and announce” prior to entry. See, e.g., United States v. DeBuse, 289 F.3d 1072, 1075 (8th Cir. 2002)(Noting “the Fourth Amendment does not require notice to an absent homeowner before execution of a search for which a warrant has issued”); United States v. Valencia-Roldan, 893 F.2d 1080, 1081 n.1 (9th Cir.), cert. denied, 495 U.S. 935 (1990); United States v. De Lutiis, 722 F.2d 902, 908 (1st Cir. 1983)(Expressing “serious doubt” as to whether absentee owner could raise a claim for violation of § 3109). In essence, this is in keeping with the Supreme Court’s holding that “police are not required to comply with the knock and announce statute where doing so would be a “useless gesture.” Miller v. United States, 357 U.S. 301, 310 (1958)(dictum).

7. **A “Breaking” Under § 3109 Does Not Always Require Force.** The Supreme Court has noted that, “although the phrase ‘break open’ implies some use of force, force is not an ‘indispensable element’ of a violation of section 3109.” United States v. Alejandro, 368 F.3d 130, 134 (2d Cir. 2004)(citation omitted). Further, the Court has “concluded that section 3109 ‘basically’ prohibits ‘an unannounced intrusion into a dwelling,’ and listed as examples of such intrusions:
- a. Officers breaking down a door;
 - b. Forcing open a chain lock on a partially open door;
 - c. Opening a locked door by use of a passkey; or
 - d. Opening a closed but unlocked door.”
- Id. at 134 (citations omitted).
8. **The Exclusionary Rule is Inapplicable to Violations of 18 U.S.C. § 3109.** Violation of knock and announce requirements alone will not result in suppression of evidence seized during the execution of a search warrant. Hudson v. Michigan, 547 U.S. 586 (2006); United States v. Carvajal, 502 F.3d 54 (2nd Cir. 2007). While the knock and announce rule is a command of the Fourth Amendment, id. at 589, citing Wilson v. Arkansas, 514 U.S. 927, 931-936 (1995), it has never protected “one’s interest in preventing the government from seeing or taking evidence described in a warrant.” Id. at 594. As the interests protected by the rule have nothing to do with the seizure of evidence, the Hudson court held that suppression is not an appropriate remedy for violation. Importantly, however, those who fail to comply with federal or state knock and announce requirements remain exposed to civil liability and agency disciplinary action.
9. **Section 3109 has Three Basic Requirements.** Pursuant to § 3109, three requirements must be met before a law enforcement officer can use force to “break open” some part of a house when executing a search or arrest warrant.

NOTE: While the following requirements reflect the current state of the law, it should always be remember that, “the focus of the ‘knock and announce’ rule is properly not on what ‘magic words’ are spoken by the police, or whether the police rang the doorbell, but rather on how these words and other actions of the police will be perceived by the occupant.” United States v. Combs, 394 F.3d 739, 744 (9th Cir. 2005) (citation omitted). “The proper trigger point, therefore, is when those inside should have been alerted that the police wanted entry to execute a warrant.” United States v. Spikes, 158 F.3d 913, 925 (6th Cir. 1998), cert. denied, 525 U.S. 1086 (1999).

- a. **An Officer Must First “Knock.”** “Although the principle is commonly referred to as ‘knock and announce,’ the Court’s holding in Wilson requires only an announcement. Similarly the federal statute ... imposes only the requirement that the officer give ‘notice of his authority and purpose.’” United States v. Smith, 63 F.3d 956, 962 (10th Cir. 1995), *vacated and remanded for resentencing by Smith v. United States*, 516 U.S. 1105 (2005). Nevertheless, “[t]he general practice of physically knocking on the door ... is the preferred method of entry.” Combs, 394 F.3d at 794. Thus, the first requirement is that a law enforcement officer first “knock.” This essentially requires that a law enforcement officer give notice of his or her presence in some fashion, such as:
- 1) **Physically Knocking on the Door Satisfies This Requirement.** See, e.g., United States v. Spriggs, 996 F.2d 320 (D.C. Cir.), cert. denied, 510 U.S. 938 (1993)(Agents complied with § 3109 where “they knocked once on the door and announced ‘Police, search warrant’ in slightly above normal tone of voice”).
 - 2) **Placing a Phone Call to the Home Satisfies This Requirement.** See United States v. Cueto, 611 F.2d 1056, 1062 (5th Cir. 1980)(Agents “complied with both the letter and spirit of section 3109” where, *inter alia*, “agents surrounded the hotel room, one agent telephoned its occupants, identified himself, and asked the occupants to come outside”).
 - 3) **Utilizing a Bullhorn Satisfies This Requirement.** See, e.g., United States v. James, 528 F.2d 999, 1017 (5th Cir.), reh’g denied, 532 F.2d 1054 (1976) and cert. denied, 429 U.S. 959 (1976), reh’g denied, 429 U.S. 1055 (1977)(“The announcement by the FBI Agents over the bullhorn of the authority and purposes of the officers present, while standing in plain view in daylight at the RNA premises, which was repeated the second time, fully satisfied the requirements of 18 U.S.C. § 3109”); Spikes, 158 F.3d at 927 (Use of bullhorn caused neighbors to exit homes to watch execution of warrant, prompting court to note: “When the execution of a warrant becomes a spectator sport, common sense dictates that the ‘knock and announce’ rule has been complied with”).
 - 4) **Utilizing a Loudspeaker Satisfies the Requirement.** See Combs, 394 F.3d. at 746.
- b. **An Officer Must Also Announce His Identity and Authority.** Second, a law enforcement officer must announce his or her identity and authority. See, e.g., Miller v. United States, 357 U.S. 301, 309-10 (1958); United States v. Manning, 448 F.2d 992, 1001-02 (2d Cir.)(en banc), cert. denied, 404 U.S. 995 (1971); United States v. Leon, 487 F.2d 389, 394 (9th Cir. 1973), cert. denied, 417 U.S. 933 (1974); United States v. Wysong, 528 F.2d 345, 348 (9th Cir. 1976); United States v. Wylie, 462 F.2d 1178, 1188 (D.C. Cir. 1972).

- c. **Before Force Can Be Used to Enter, an Officer Must be Refused or Denied Admittance.** Third, a law enforcement officer must be refused or denied admittance. "It is well established that the phrase 'refused admittance' is not restricted to an affirmative refusal, but encompasses circumstances that constitute constructive or reasonably inferred refusal." United States v. Bonner, 874 F.2d 822, 824 (D.C. Cir. 1989)(citations omitted). A refusal of admittance can take a variety of forms.
- 1) **Silence Can Be Construed as Refusal of Entry.** An affirmative refusal of entry is not required by § 3109,. Instead, refusal may be implied in some instances. For example, "[a] refusal to comply with an officer's order to 'open up' can be inferred from silence," United States v. Granville, 222 F.3d 1214, 1218 (9th Cir. 2000)(citation omitted). However, this is only true in situations where a reasonable period of time has passed. Thus, after a reasonable period of time, silence may be construed as constructive refusal of admittance.
- a) **What Constitutes a "Reasonable Period of Time" is Determined By the Totality of the Circumstances.** Unfortunately, "no case from the Supreme Court ... has yet specifically addressed how long officers must wait before entering a residence after knocking and announcing their presence." United States v. Jones, 133 F.3d 358, 361 (5th Cir.), cert. denied, 523 U.S. 1144 (1998).
- (1) **"Reasonableness" is Fact Intensive.** Instead, rulings on what constitutes a "reasonable" amount of time are "highly contextual, turning on factors that indicate whether the amount of time given was enough for the defendant to ascertain who was at the door and to respond, and whether officers' safety was at risk." Sargent, 319 F.3d at 11 (citations omitted). *See also* United States v. Vesey, 338 F.3d 913, 915 (8th Cir. 2003)(Noting "whether police officers have waited long enough after knocking to infer that they have been constructively denied admittance, and thus may enter, 'does not turn on any hard and fast time limit, but depends upon the circumstances confronting the officer serving the warrant'")(citation omitted).
- (2) **Facts Known to the Officer Are What's Important in Determining Reasonableness.** "The facts known to the police are what count in judging reasonable waiting time[s]" for purposes of § 3109. Banks, 540 U.S. at 527.

b) **Factors to Consider in Determining Whether Officers Waited a Reasonable Period of Time.** Generally speaking, “[t]he amount of time officers need to wait before entering a home necessarily depends on how much time it would take for a person in the house to open the door.” Spikes, 158 F.3d at 927. Factors that courts have considered in making this determination include, but are not limited to, the following:

- (1) **The Time of Day.** “When the police execute a warrant in the dead of night or have some other reason to believe that a prompt response from the homeowner would be unlikely, the length of time the officers should wait increases.” Spikes, 158 F.3d at 927. “Correspondingly, when officers execute a warrant in the middle of the day ... the length of time the officers must tarry outside diminishes.” Id. See also Vesey, 338 F.3d at 916 (Entry was reasonable based in part on the fact that the officers “arrived in the afternoon, when it was likely that any occupants were awake”); United States v. Chavez-Miranda, 306 F.3d 973, 980 (9th Cir. 2002), cert. denied, 537 U.S. 1217 (2003)(Noting that, in evaluating reasonableness, courts should consider, among other factors, “the time of day” the warrant was executed); United States v. Gallegos, 314 F.3d 456, 460 (10th Cir. 2003)(“We have held that when a warrant is executed in the middle of the day, ‘the amount of time the officers need to wait before entering is generally reduced’”).
- (2) **The Size and Physical Layout of the Residence.** The size and physical layout of the residence is also a factor that must be considered in determining the reasonableness of an entry. So, while a larger residence might require greater amount of time, a smaller residence would require a lesser amount. See, e.g., Vesey, 338 F.3d at 916 (Entry reasonable based in part on the “size of the apartment,” which the court classified as “small”); Gallegos, 314 F.3d at 461 (Noting “the physical characteristics of the [suspect’s] residence are relevant to our determination”); Chavez-Miranda, 306 F.3d at 980 (Same).

- (3) **The Nature of the Crime.** The nature of the crime under investigation may be considered in determining the reasonableness of an entry. This is especially true in cases involving drugs. *See, e.g., United States v. One Parcel of Real Property*, 873 F.2d 7, 9 (1st Cir.), *cert. denied sub nom. Latraverse v. United States*, 493 U.S. 891 (1989) ("The fact that the officers had probable cause to believe that the occupants possessed cocaine, a substance that is easily and quickly removed down a toilet, is additional justification for the shorter wait before entry"); *Vesey*, 338 F.3d at 915 (Noting "the suspected presence of drugs in the place to be searched has been held to lessen the time that police officers are required to wait"); *Spikes*, 158 F.3d at 926 (Noting "the presence of drugs in the place to be searched, while not a conclusive factor, lessens the length of time law enforcement must ordinarily wait outside before entering a residence").
- (4) **Any Evidence Demonstrating Guilt.** Evidence demonstrating guilt is a factor that may be considered in determining the reasonableness of an entry. *See Chavez-Miranda*, 306 F.3d at 980; *Doran v. Eckhold*, 409 F.3d 958, 965-67 (8th Cir. 2005) (evidence of drug distribution found in garbage).
- (5) **Other Observations Supporting a Forced Entry.** Other observations supported forced entry may be considered, including, for example, defensive measures taken by the residents of the premises. *See, e.g., Spikes*, 158 F.3d at 926 (Where suspects took defensive measures, such as "the use of police scanning equipment, the placement of lookouts in various strategic places within the home, and, most importantly, the presence of guns and armed guards," the officers "did not need to wait long enough for a barrage of bullets from within before concluding that they had given the occupants enough time to respond to their request for entry").
- c) **Numerous Cases Have Considered What a "Reasonable Period of Time" is for Purposes of § 3109.** While there is no "bright line" standard for what a "reasonable" period of time is before entering, numerous circuits have addressed the issue. The following selection of cases is taken directly from *Jones, supra*.

- (1) **Five Seconds of Silence or Less Generally Found to Violate § 3109.** "Generally, a delay of five-seconds or less after knocking and announcing has been held a violation of § 3109." Jones, 133 F.3d at 361. See, e.g., United States v. Moore, 91 F.3d 96, 98 (10th Cir. 1996)(Officers waited 3 seconds at most and the Government failed even to allege that the officers harbored a concern for their safety); United States v. Lucht, 18 F.3d 541, 550-51 (8th Cir. 1994) (Waiting 3 to 5 seconds before entering was not long enough); United States v. Rodriguez, 663 F. Supp. 585, 587-88 (D.D.C. 1987)(Delay of 3 to 5 seconds was insufficient); United States v. Marts, 986 F.2d 1216, 1217-18 (8th Cir. 1993) (Lapse of less than 5 seconds held not sufficient to infer refusal of admittance necessary to comply with § 3109); United States v. Nabors, 901 F.2d 1351, 1355 (6th Cir. 1990) (Forced entry only seconds after announcing the officers' authority and purpose must be "carefully scrutinized"); United States v. Mendonsa, 989 F.2d 366, 370 (9th Cir. 1993)(Waiting 3 to 5 seconds was insufficient).

- (2) **Five Seconds or More of Silence Generally Found to Satisfy § 3109.** "However, when officers have waited more than 5 seconds, the courts have generally held that there was no violation of § 3109." Jones, 133 F.3d at 361. See, e.g., Vesey, 338 F.3d at 916 ("Given the size of the apartment, the time of day, the lack of any verbal response, and the suspected presence of drugs, we conclude that ten seconds was a reasonable period for the police to wait before their forced entry"); United States v. Markling, 7 F.3d 1309, 1318 (7th Cir. 1993)(Officers waited 7 seconds before starting to try to knock the door down); United States v. Spriggs, 996 F.2d 320, 322-23 (D.C. Cir.), cert. denied, 510 U.S. 938 (1993) (Officers waited 15 seconds before attempting to enter); United States v. Ramos, 923 F.2d 1346, 1355-56 (9th Cir. 1991) *rev'd on other grounds and remanded by United States v. Ruiz*, 257 F.3d 1030 (9th Cir. 2001) (After two requests and 45 seconds); United States v. Myers, 106 F.3d 936, 940 (10th Cir.), cert. denied, 520 U.S. 1270 (1997) (Agents waited 10 seconds before battering the door down); United States v. Knapp, 1 F.3d 1026, 1030-31 (10th Cir. 1993)(10 to 12 seconds was sufficient to wait); United States v. Gatewood, 60 F.3d 248, 250 (6th Cir. 1995)(No violation when officers waited about 10 seconds between announcement and entry).

- 2) **Sounds of Flight by the Occupants May Be Construed as Refusal of Admittance.** The sounds of flight by the occupants of the residence can be construed as refusal or denial of admittance. See, e.g., United States v. Gillaum, 372 F.3d 848, 855 (7th Cir. 2004)(Holding “the sound of footsteps coming from inside the apartment and not moving closer to the entry door was sufficient for [the officer] to order the forcible entry and disregard the knock and announce requirement”); United States v. Stiver, 9 F.3d 298, 302 (3rd Cir. 1993), cert. denied, 510 U.S. 1136 (1994)(“When [the officers] announced their presence, they heard heavy and hurried footsteps leading away from the door. Under these circumstances, the officers did not violate the common law rule by entering without waiting for someone to open the door”); Bonner, 874 F.2d at 826 (Refusal of admittance inferred because, *inter alia*, officers “heard footsteps running from the door”); United States v. Pennington, 328 F.3d 215, 221 (6th Cir. 2003)(Sounds of flight from inside the residence “would indicate to a reasonable police officer that the request for entry was being effectively denied, that the person inside the home was taking some type of evasive action, including the possible destruction of contraband, and that the person inside the home was aware that police were seeking entry to his home”).
- 3) **Sounds of Evidence Being Destroyed May Be Construed as Refusal of Admittance.** Refusal or denial of admittance can also be inferred from the sounds of evidence being destroyed. See, e.g., Masiello v. United States, 317 F.2d 121 (D.C. Cir. 1963)(Commotion heard through the door qualified as refusal of admittance because it meant “the occupants were very likely engaged in what might be called ‘standard emergency procedure’ of destroying the evidence”); United States v. Anderson, 39 F.3d 331, 346 (D.C. Cir. 1994), rev’d on other grounds, 59 F.3d 1323 (D.C. Cir. 1995)(en banc)(Refusal of admittance where “the police heard noises consistent with the destruction of evidence emanating from within the apartment, and ... the persons inside made no effort to respond to the officers’ knock”).
- 4) **Verbal Refusal May Be Construed as Refusal of Admittance.** A refusal of admittance may be expressly made, such as when the occupant of a residence yells for a law enforcement officer to “go away.” However “[t]he phrase ‘refused admittance’ is not restricted to an affirmative refusal. Rarely if ever is there an affirmative refusal. More often the officers meet with silence as the occupants seek to destroy evidence or escape. Accordingly, whether the failure to respond to an officer’s knock constitutes refused admittance is a question of the circumstances.” United States v. Ortiz, 445 F.2d 1100, 1102 n.2 (10th Cir.), cert. denied, 404 U.S. 993 (1971)(internal citations omitted).

- 5) **Gunfire From Inside the Residence May Be Construed as Refusal of Admittance.** Finally, refusal of admittance may be inferred from a suspect's discharge of a firearm upon receiving notice of a law enforcement officer's purpose and authority.
10. **When Exigent Circumstances Exist, a Law Enforcement Officer May Dispense With the Requirements of § 3109.** "The Fourth Amendment does not forbid no-knock searches. Rather, it requires that searching officers justify dispensing with the knock-and-announce requirement." United States v. Scroggins, 361 F.3d 1075, 1081 (8th Cir. 2004). Thus, law enforcement officers may also use force to enter a residence when exigent circumstances exist. See Banks, 540 U.S. at 43 (Noting "that § 3109 is subject to an exigent circumstances exception ... which qualifies the requirement of refusal after notice, just as it qualifies the obligation to announce in the first place")(internal citation omitted). In such cases, the officers may dispense with the notice and authority requirements of § 3109. See, e.g., United States v. Hatfield, 365 F.3d 332, 339 (4th Cir. 2004)(Noting that, while Supreme Court cases have established that "any forcible entry into a dwelling must be preceded by both a knock and notice of identity and authority," there are exceptions to the rule that "occur when government agents encounter circumstances that present a threat of physical violence and when evidence may be destroyed if agents announce their presence"); United States v. Grogins, 163 F.3d 795, 797 (4th Cir. 1998)(Noting that the "knock-and-announce requirement may be excused by exigent circumstances").
- a. **A Law Enforcement Officer Must Have Reasonable Suspicion That Exigent Circumstances Exist.** In order to use force to enter a residence without complying with the "knock and announce" requirements of § 3109, law enforcement officers "must have more than a mere hunch or suspicion before an exigency can excuse the necessity for knocking and announcing their presence." United States v. Bates, 84 F.3d 790, 695 (6th Cir. 1996). Instead, the officers "must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." Richards v. Wisconsin, 520 U.S. 385, 394 (1997).
- b. **There are Five Common Exigencies (Exceptions to § 3109).** The primary exigent circumstances that allow officers to disregard § 3109 are:

- 1) **Danger to Officers or Third Parties May Excuse Compliance With § 3109.** Where reasonable suspicion exists to believe that "knocking and announcing" could result in danger to law enforcement officers or third parties, the requirements of § 3109 may be excused. See, e.g., Richards, 520 U.S. at 394; Smith, 386 F.3d at 759 (Exigent circumstances that may excuse compliance with knock and announce rule include those where "the officers have a justified belief that someone within is in imminent peril of bodily harm"); Brown, 52 F.3d at 424 ("Exigent circumstances will excuse non-compliance with the knock and announce requirement when the officers, 'after considering the particular facts regarding the premises to be searched and the circumstances surrounding the execution of the warrant,' reasonably believe there is an urgent need to force entry The need to force entry may result from danger to the safety of the entering officers or from the imminent destruction of evidence"); United States v. Peterson, 353 F.3d 1045, 1049-50 (9th Cir. 2003)(Where police reasonably believed residence contained explosives, defendant had claimed readiness to "blow some shit up ... at any time," and defendant was known to carry a concealed weapon illegally, exigent circumstances justified entry); United States v. Murphy, 69 F.3d 237, 243 (8th Cir. 1995), cert. denied, 516 U.S. 1153 (1996)("In Murphy's case, besides fearing for their own safety, officers also feared for the safety of innocent citizens in the neighborhood"); United States v. Gambrell, 178 F.3d 927, 929 (7th Cir.), cert. denied, 528 U.S. 920 (1999)("The information Agent Eckerty learned from his informant - that Cookie regularly sold drugs out of her apartment; that she answered the door wearing a .25 caliber gun in her front pocket; that she and her roommate regularly carried guns in the apartment; that, in addition to the gun strapped on Cookie, there were other guns, drugs, and drug paraphernalia in the apartment--was enough to create a reasonable suspicion that an announced entry would have subjected the officers to a substantial risk of harm"); Sargent, 319 F.3d at 12 ("In order to justify entry without knocking on the basis of concern for officers' safety, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous")(citation and internal quotation marks omitted).

- 2) A Suspect's Significant Criminal History May Be Considered In Determining Whether Compliance With § 3109 is Required. "On occasion, a suspect's significant criminal history of violence may provide the necessary additional specific information justifying a no-knock entry." United States v. Musa, 401 F.3d 1208, 1213 (10th Cir. 2005)(Upholding "no-knock" entry in part because of the defendant's extensive criminal history, which included convictions for felony auto theft, marijuana possession, and being a felon-in-possession of a firearm, as well as five other arrests: (1) for domestic battery, obstruction, and terroristic threat; (2) for domestic battery, obstruction, possession of drug paraphernalia, and battery on a law-enforcement officer; (3) for domestic battery and unlawful restraint; (4) for domestic battery; and (5) for possession of methamphetamine, possession of marijuana, possession of drug paraphernalia, and traffic violations).
- 3) Destruction of Evidence May Excuse Compliance With § 3109. Where reasonable suspicion exists that knocking and announcing would result in the destruction of evidence, the requirements of § 3109 may be excused. See, e.g., Richards, 520 U.S. at 394 (Notice may be excused where to do so would allow "the destruction of evidence"); Smith, 386 F.3d at 759 (Exigent circumstances that may excuse compliance with knock and announce rule include those where "the officers have a justified belief that those within are aware of their presence and are engaged in escape or the destruction of evidence"); Peterson, 353 F.3d at 1050 ("Once the occupants knew police were outside, the suspected presence of drugs - the quintessential disposable contraband - provided yet another justification for the no-knock entry"); Brown, 52 F.3d at 424 ("The need to force entry may result ... from the imminent destruction of evidence").

- 4) Compliance With § 3109 May Be Excused Where Knocking and Announcing Would Be a “Useless Gesture.” Where “knocking and announcing” would be a “useless gesture,” as when the suspect is aware of a law enforcement presence, the requirements of § 3109 may be excused. See, e.g., Richards supra at 396 (Entry without notice allowed, in part, because of “petitioner’s apparent recognition of the officers”); Miller v. United States, 357 U.S. 301, 310 (1958) (dictum)(“It may be that, without an express announcement of purpose, the facts known to officers would justify them in being virtually certain that the petitioner already knows their purpose so that an announcement would be a useless gesture”); Smith, 386 F.3d at 759 (Exigent circumstances that may excuse compliance with knock and announce rule include those where “the persons within the residence already know of the officers’ authority and purpose”); Peterson, 353 F.3d at 1049 (Knocking and announcing would have been futile where “just as this announcement was about to be made, [the defendant] unexpectedly opened the door, saw that police were outside, and attempted to deny them entry”; as noted by the court: “Just as one cannot close a door that is already closed, one cannot ‘announce’ a presence that is already known”); United States v. Tracy, 835 F.2d 1267, 1270 (8th Cir.), cert. denied, 486 U.S. 1014 (1988) (“Announcement of purpose is excused when it constitutes a useless gesture because the “facts known to [the] officers justify them in being virtually certain the [persons to be apprehended] already know their purpose”) (citation omitted).

- 5) A Law Enforcement Officer May Also Utilize a Ruse to Avoid Implicating **§ 3109**. “It is well-established that ‘in the detection of many types of crime, the Government is entitled to use decoys and conceal the identity of its agents.’” Alejandro, 368 F.3d at 136-37 (citation omitted). For that reason, “[a]n entry obtained without force by ruse or deception is not a violation of section 3109.” United States v. Defeis, 530 F.2d 14, 15 (5th Cir.), cert. denied, 429 U.S. 830 (1976). See also Alejandro, 368 F.3d at 137 (Officer’s announcement that there was a gas leak in the apartment and that he (the officer) was with the gas company was a permissible ruse); Linbrugger v. Abercia, 363 F.3d 537, 541 (5th Cir. 2004)(“As long as police officers do not use force, they may attempt to gain entry to a dwelling by deception”)[citing Lewis v. United States, 385 U.S. 206, 211-12 (1966)]; United States v. Contreras-Ceballos, 999 F.2d 432, 435 (9th Cir. 1993)(“A law enforcement officer’s use of a ruse to gain admittance does not implicate section 3109 because it entails no breaking”); and United States v. Raines, 536 F.2d 796, 800 (8th Cir.), cert. denied, 429 U.S. 925 (1976) (“A police entry into a private home by invitation without force, though the invitation be obtained by ruse, is not a breaking and does not invoke the common law requirement of prior announcement of authority and purpose, codified in § 3109”).

NOTE: It should be remembered that, if an attempted entry by ruse fails, “the knock-and-announce rule continues to apply to a later forcible entry.” Linbrugger, 363 F.3d at 542. See, e.g., Richards, 520 U.S. at 388 (Finding that, after a failed entry by deception, the officers’ noncompliance with the knock-and-announce requirement was reasonable).

- 6) When a Law Enforcement Officer is in “Hot Pursuit,” Compliance With **§ 3109** May Be Excused. Law enforcement officers who are in “hot pursuit” of a suspect need not pause at the front door of a residence in order to “knock and announce” their presence. See, e.g., United States v. Flores, 540 F.2d 432, 435 (9th Cir. 1976)(“Entry in ‘hot pursuit’ has always been considered an exception to the knock and announce provisions of this section”) (citations omitted).

11. **Use of Force to Enter a Residence is Permissible Once the Requirements of § 3109 Have Been Fulfilled or Exigent Circumstances Exist.** Once the requirements of § 3109 have been fulfilled, or exigent circumstances exist, a law enforcement officer may use force to “break open” a door or window to the residence. In its most basic form, “entry without consent ordinarily amounts to ‘breaking’ under Title 18 U.S.C. § 3109.” United States v. Harris, 435 F.2d 74, 82 (D.C. Cir. 1970), cert. denied, 402 U.S. 986 (1971). This includes situations where “officers break down a door, force open a chain lock on a partially open door, open a locked door by use of a passkey, or ... open a closed but unlocked door.” Sabbath v. United States, 391 U.S. 585, 590 (1968).
- a. **The Statute Does Not Apply When the Door is Already Open.** Numerous courts have found that “the statute does not apply to officers who enter through open doors.” United States v. Phillips, 149 F.3d 1026, 1029 (9th Cir. 1998), cert. denied, 526 U.S. 1052 (1999). See also United States v. Mendoza, 281 F.3d 712, 717 (8th Cir.), cert. denied, 537 U.S. 1004 (2002) (“Most circuits courts deciding the issue have concluded when the door is open, the rule is vitiated”); United States v. Kemp, 12 F.3d 1140 (D.C. Cir. 1994); United States v. Remigio, 767 F.2d 730 (10th Cir.), cert. denied, 474 U.S. 1009 (1985).
- b. **The Statute Does Not Apply When the Knocking Opened the Door.** Similarly, the statute will not apply when a knock on a door causes the door to open, so long as the knock is done with “ordinary” force. See Kemp, 12 F.3d at 1141 (“There is no ‘breaking’ at least where (1) the officer used only the force ordinarily used to knock upon, not to knock down, a door; and (2) an occupant is made aware of the officer’s presence and purpose before the officers enters the premises”).
12. **Law Enforcement Officers May seek “No-Knock” Warrants.** In the right circumstances, a law enforcement officer may request a “no-knock” warrant, which allows them to dispense with the requirements to knock and announce before entry.
- a. **What Are “No-Knock” Warrants?** In sum, “[w]hen the police obtain a no-knock warrant, they have anticipated exigent circumstances before searching, and have asked for pre-search judicial approval to enter without knocking.” Scroggins, 361 F.3d at 1081.
- b. **The Benefits of “No-Knock” Warrants.** “The issuance of a warrant with a no knock provision potentially insulates the police against the subsequent finding that exigent circumstances, as defined in Richards, did not exist.” United States v. Tisdale, 195 F.3d 70, 72 (2d Cir. 1999). See also Scroggins, 361 F.3d at 1082 (“Although the standards are the same regardless of whether the police visit a judge before or after they search, if they do so beforehand, and the judge is wrong, the police can rely upon the Leon good-faith exception”).

- c. **No-Knock Warrants v. Exigent Circumstances.** "The showing the police must make to obtain a no-knock warrant is the same showing they must make to justify their own decision to dispense with the knock-and-announce requirement. Only the timing differs." Scroggins, 361 F.3d at 1082. See also Banks, 540 U.S. at 36 ("When a warrant applicant gives reasonable grounds to expect futility or to suspect that one or another such exigency already exists or will arise instantly upon knocking, a magistrate judge is acting within the Constitution to authorize a 'no-knock' entry").
- d. **Disapproval of a Request For a "No-Knock" Warrant Does Not Always Preclude a "No-Knock" Entry.** A judicial officer's decision not to authorize a no-knock entry does not preclude officers, when executing a warrant, from concluding that it would be reasonable to enter without knocking and announcing. As the Supreme Court has noted: "The practice of allowing magistrates to issue no-knock warrants seems entirely reasonable when sufficient cause to do so can be demonstrated ahead of time. But ... a magistrate's decision not to authorize a no-knock entry should not be interpreted to remove the officers' authority to exercise independent judgment concerning the wisdom of a no-knock entry at the time the warrant is being executed." Richards, 520 U.S. at 396 n.7.
- e. **The Supreme Court Has Endorsed the Issuance of "No-Knock Warrants."** "The practice of allowing magistrates to issue no-knock warrants seems entirely reasonable when sufficient cause to do so can be demonstrated ahead of time." Richards, 520 U.S. 396 n.7. According to the Department of Justice Office of Legal Counsel, "officers need not take affirmative steps to make an independent re-verification of the circumstances already recognized by a magistrate in issuing a no-knock warrant, [but] such a warrant does not entitle officers to disregard reliable information clearly negating the existence of exigent circumstances when they actually receive such information before execution of the warrant." Thus, "when agents have reason to believe that knocking and announcing their presence would allow the destruction of evidence, would be dangerous, or would be futile, agents should request that the magistrate judge issue a no-knock warrant." *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations*, Computer Crime and Intellectual Property Section, Criminal Division, DOJ, at 75 (March 2001).

L. EPO #12: IDENTIFY THOSE OFFICIALS WHO HAVE THE AUTHORITY TO ISSUE FEDERAL SEARCH WARRANTS

- 1. **General Rule – Rule 41 and Rule 1 of the Federal Rules of Criminal Procedure Dictate Who May Issue a Federal Search Warrant.** The rules regarding who may issue Federal search warrants are contained in Rule 41 and Rule 1 of the Federal Rules of Criminal Procedure.

2. **Who May Issue Federal Search Warrants?**
 - a. **United States Magistrate Judge** – Rule 41(b)
 - b. **United States District Court Judge** – Rule 1(c)(Providing that, “when the[] rules authorize a magistrate judge to act, any other federal judge may also act”).
 - c. **United States Circuit Court of Appeals Judge** – Rule 1(c)
 - d. **United States Supreme Court Justice** – Rule 1(c)
 - e. **State Court Judge of a Court of Record** – Rule 41(b). “State judges were included in Rule 41 because they are far more plentiful than the small corps of federal magistrates.” United States v. Burke, 517 F.2d 377, 382 (2d Cir. 1975).
3. **State Judges Whom Issue Federal Search Warrants Must Be of a Court of Record.** Questions often arise as to whether a state court judge is a “court of record” as required by Rule 41(b). “Under [Rule 41(b)], whether an individual is a judge of a state court of record is governed by state law.” United States v. Martinez-Zayas, 857 F.2d 122, 135 (3rd Cir. 1988). However, “it is generally accepted that the one essential feature necessary to constitute a court of record is that a permanent record of the proceedings of the court must be made and kept.” Dekalb County v. Deason, 144 S.E.2d 446, 447 (Ga. 1965).
4. **There are also Jurisdictional Requirements for the Issuance of Federal Search Warrants.** Various statutory provisions provide jurisdictional limits on the issuance of Federal search warrants.
 - a. **Rule 41 Provides Some Jurisdictional Requirements for the Issuance of Federal Search Warrants.** Pursuant to Rule 41(b), jurisdictional requirements exist in the issuance of Federal search warrants.
 - 1) **Within the District.** Federal search warrants may be issued by federal judges, or a judge from a state court of record, “to search for and seize a person or property located within the district.” Rule 41(b)(1).
 - 2) **Outside the District.** “[A] magistrate judge with authority in the district has authority to issue a warrant for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed.” Rule 41(b)(2).
 - 3) **Terrorism Investigations.** “[A] magistrate judge - in an investigation of domestic terrorism or international terrorism - having authority in any district in which activities related to the terrorism may have occurred, may issue a warrant for a person or property within or outside that district.” Rule 41(b)(3).

- 4) **Tracking Devices.** “[A] magistrate judge with authority in the district has authority to issue a warrant to install within the district a tracking device; the warrant may authorize use of the device to track the movement of a person or property located within the district, outside the district, or both.” Rule 41(b)(4).
 - 5) **Title 18 U.S.C. § 2703(a)** and (b) Allow Judges With Jurisdiction Over the Offense to Issue Nationwide Search Warrants for Stored Wire or Electronic Communications. Pursuant to Title 18 U.S.C. § 2703(a) and (b), law enforcement officers may obtain Federal search warrants for the contents of wire or electronic communications held in storage by either an electronic communications service or remote computing service from “a court with jurisdiction over the offense under investigation.” In sum, this means that a law enforcement officer may obtain a Federal search warrant from a Federal judge who has jurisdiction over the offense in question, although not necessarily the place or item to be searched. For example, this provision would allow a law enforcement officer to obtain a search warrant from a Magistrate Judge in the Southern District of Georgia for electronic files stored on the server of an Internet Service Provider in California.
5. **Magistrate Judges Who Issue Warrants are Required to be “Neutral and Detached.”** “The primary reason for the warrant requirement is to interpose a ‘neutral and detached magistrate’ between the citizen and ‘the officer engaged in the often competitive enterprise of ferreting out crime.’” United States v. Karo, 468 U.S. 705, 717 (1984)(emphasis added)(citation omitted). See also Thompson v. Louisiana, 469 U.S. 17, 20 (1984)(“We have consistently reaffirmed our understanding that in all cases outside the exceptions to the warrant requirement the Fourth Amendment requires the interposition of a neutral and detached magistrate between the police and the ‘persons, houses, papers, and effects’ of citizens”). For that reason, the judge who issues the search warrant must be “neutral and detached.” See, e.g., Shadwick v. Tampa, 407 U.S. 345, 350 (1972)(“An issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search”).
- a. **Judge Who Issued Warrant and Participated in Search Not Neutral and Detached.** Thus, for example, where the judge who issued the warrant also participated in the search, he was found not to be neutral and detached. Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 327 (1979).
 - b. **State Attorney General is Not Neutral and Detached.** Also, where the issuing authority was the State Attorney General “who was actively in charge of the investigation and later was to be chief prosecutor at the trial,” the “neutral and detached” magistrate requirement was violated. Coolidge v. New Hampshire, 403 U.S. 443, 450 (1971).

- c. **District Attorney is Not Neutral and Detached.** Similarly, if a warrant were to be issued “by the District Attorney himself,” it would not meet the requirements of neutrality and detachment. Mancusi v. DeForte, 392 U.S. 364, 371 (1968).
- d. **Where Magistrate has a Financial Interest in the Issuance of Warrants, He is Not Neutral and Detached.** Finally, where the issuing magistrate has a financial interest in the issuance of search warrants, the magistrate is not “neutral and detached.” Connally v. Georgia, 429 U.S. 245, 250 (1977)(Issuance of warrants by justices of the peace who received financial compensation for each warrant issued held invalid, because it presented a situation “where the defendant [was] subjected to what surely is judicial action by an officer of a court who has ‘a direct, personal, substantial, pecuniary interest’ in his conclusion to issue or to deny the warrant”).

M. EPO #13: IDENTIFY THE COMPONENTS OF AN AFFIDAVIT FOR A SEARCH WARRANT

1. **General Rule – Search Warrants Must Particularly Describe the Place to Be Searched and the Person or Things to Be Seized.** The Supreme Court has recognized that the decision to proceed “by search warrant is a drastic one, and must be carefully circumscribed so as to prevent unauthorized invasions of the sanctity of a man’s home and the privacies of life.” Berger v. New York, 388 U.S. 41, 58 (1967). “General warrants ... are prohibited by the Fourth Amendment. The problem posed by the general warrant is not that of intrusion per se, but of a general, exploratory rummaging in a person’s belongings....” Andresen v. Maryland, 427 U.S. 463, 480 (1976)(citation omitted). As noted by the Supreme Court:

“The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one ‘particularly describing the place to be searched and the persons or things to be seized.’ The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.” Maryland v. Garrison, 480 U.S. 79, 84 (1987)(footnote omitted).

Accordingly, any affidavit for a search warrant must particularly describe (1) the place to be searched, and (2) the person or things to be seized. See Rule 41(e)(2) (“The warrant must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned”).

2. **Affidavits Must Establish a Nexus Between the Items Sought and the Location to Be Searched.** “It is critical to a showing of probable cause that the affidavit state facts sufficient to justify a conclusion that evidence or contraband will probably be found at the premises to be searched.” United States v. Hove, 848 F.2d 137, 140 (9th Cir. 1988).
- a. **Standard for Establishing a “Nexus.”** Accordingly, an affidavit for search warrant must contain “sufficient information to conclude that a fair probability existed that seizable evidence would be found in the place sought to be searched.” United States v. Pigrum, 922 F.2d 249, 253 (5th Cir. 1991). See also United States v. Ribeiro, 397 F.3d 43, 49 (1st Cir. 2005) (“[T]he application must give someone of ‘reasonable caution’ reason to believe that evidence of a crime will be found at the place to be searched”); United States v. Carpenter, 360 F.3d 591, 594 (6th Cir. 2004) (“There must ... be a ‘nexus between the place to be searched and the evidence sought’”); United States v. Martin, 297 F.3d 1308, 1314 (11th Cir. 2002) (“Specifically, the affidavit should establish a connection between the defendant and the residence to be searched and a link between the residence and any criminal activity”); United States v. Strother, 318 F.3d 64, 70 (1st Cir. 2003) (“A warrant application must demonstrate probable cause to believe that (1) a crime has been committed (the ‘commission’ element), and (2) enumerated evidence of the offense will be found at the place to be searched (the ‘nexus’ element)”); United States v. Tellez, 217 F.3d 547, 550 (8th Cir. 2000) (“We agree, of course, that there must be evidence of a nexus between the contraband and the place to be searched before a warrant may properly issue ...”).
- b. **Factors to Consider in Determining Whether the “Nexus” Requirement Has Been Satisfied.** The courts have come up with some factors that a magistrate may utilize in determining whether the “nexus” requirement has been satisfied. These factors include:
- 1) Direct Observation;
 - 2) The Nature of the Crime;
 - 3) The Nature of the Items Sought;
 - 4) The Opportunity for Concealment; **and**
 - 5) Normal Inferences as to Where a Criminal Would Hide Evidence.

See United States v. Feliz, 182 F.3d 82, 88 (1st Cir. 1999), cert. denied, 528 U.S. 1119 (2000); United States v. Jones, 994 F.2d 1051, 1056 (3d Cir. 1993); United States v. Allen, 211 F.3d 970, 976 (6th Cir. 2000) (“[W]here a known person, named to the magistrate, to whose reliability an officer attests with some detail, states that he has seen a particular crime and particular evidence, in the recent past, a neutral and detached magistrate may believe that evidence of a crime will be found”); United States v. Jackson, 756 F.2d 703, 705 (9th Cir. 1985); United States v. Hendrix, 752 F.2d 1226, 1231 (7th Cir.), cert. denied sub nom. Merritt v. United States, 471 U.S. 1021 (1985)(quotation omitted).

- c. **The “Nexus” May Be Established Through Inference.** “The nexus between the objects to be seized and the [place to be] searched need not, and often will not, rest on direct observation, but rather can be inferred from the type of crime, the nature of the items sought, the extent of an opportunity for concealment and normal inferences as to where a criminal would hide evidence of a crime.” Feliz, 182 F.3d at 88. Of course, this is not to “suggest that, in all criminal cases, there will automatically be probable cause to search a suspect’s residence.” Id. Instead, “[a]ll factors must be weighed in each case in order to assess the reasonableness of inferring that evidence of the crime can be found at the suspect’s home.” Id. In sum, however, “interpreting a search warrant affidavit in the proper ‘commonsense and realistic fashion,’ may result in the inference of probable cause to believe that criminal objects are located in a particular place, such as a suspect’s residence, to which they have not been tied by direct evidence.” Id. (internal citation omitted). See also Jones, 994 F.2d at 1056 (“While ideally every affidavit would contain direct evidence linking the place to be searched to the crime, it is well established that direct evidence is not required for the issuance of a search warrant”).
- d. **Examples.** The two examples listed below illustrate situations in which the required “nexus” can be been inferred from the circumstances.
- 1) **Possession of Drugs/Drugs in Residence.** “As a matter of common sense, it is logical to infer that someone in possession of valuable contraband would store that contraband in a safe, accessible location such as his or her residence.” United States v. Carpenter, 341 F.3d 666, 671-72 (8th Cir. 2003) (Affidavit provided information from reliable informant that suspect was in “possession of methamphetamine,” but did not state drugs were at the suspect’s residence).

- 2) **Dealing of Drugs/Drugs in Residence.** "In the case of drug dealers, evidence is likely to be found where the dealers live." United States v. Angulo-Lopez, 791 F.2d 1394, 1399 (9th Cir. 1986). See also United States v. Whitner, 219 F.3d 289, 297(3d Cir. 2000)("In the case of drug dealers, a number of other courts of appeals have held that evidence of involvement in the drug trade is likely to be found where the dealers reside"); United States v. McClellan, 165 F.3d 535, 546 (7th Cir.), cert. denied, 526 U.S. 1125 (1999)("In issuing a search warrant, a magistrate is entitled to draw reasonable inferences about where the evidence is likely to be kept ... and ... in the case of drug dealers evidence is likely to be found where the dealers live")(quotation, internal quotations and citations omitted); United States v. Luloff, 15 F.3d 763, 768 (8th Cir. 1993)(Observations of drug trafficking occurring away from dealer's residence along with officer's statement in affidavit that drug dealers often store evidence in their residences provided probable cause for search of dealer's house); United States v. Thomas, 989 F.2d 1252, 1255 (D.C. Cir. 1993)(per curiam)(Observations of drug trafficking occurring away from dealer's residence can provide probable cause for search of dealer's house); United States v. Williams, 974 F.2d 480, 482 (4th Cir. 1992)(per curiam)(Affidavit establishing that known drug dealer was residing in a motel room established sufficient probable cause to search motel room for drug paraphernalia); United States v. Davidson, 936 F.2d 856, 859-60 (6th Cir. 1991)(Evidence of pattern of defendant's involvement in drug-dealing established probable cause to search defendant's residence although there was no direct evidence of drug dealing occurring at the residence). But see United States v. Nolan, 199 F.3d 1180, 1184 (10th Cir. 1999)(Declining to decide whether evidence of drug trafficking will likely be found where a drug dealer lives).
3. **The Information in the Affidavit Cannot Be "Stale."** "Probable cause must exist when a warrant is issued, not merely at some earlier time." United States v. LaMorie, 100 F.3d 547, 554 (8th Cir. 1996). See also United States v. Ozar, 50 F.3d 1440, 1446 (8th Cir.), cert. denied, 516 U.S. 871 (1995). "There is no bright-line test for determining when information is stale." United States v. Koelling, 992 F.2d 817, 822 (8th Cir. 1993)(citation omitted). Instead, "whether the averments in an affidavit are sufficiently timely to establish probable cause depends on the particular circumstances of the case." *Id.* See also United States v. Greene, 250 F.3d 471, 480 (6th Cir. 2001)(Holding that "a staleness determination should be flexible, resting on numerous factors"). In deciding whether the information in a warrant affidavit is stale, courts have considered the following factors:

- a. **Age of the Information Contained in the Affidavit.** “Age of the information supporting a warrant application is a factor in determining probable cause. If too old, the information is stale, and probable cause may no longer exist.” United States v. Harvey, 2 F.3d 1318, 1322 (3d Cir. 1993). See also United States v. McNeese, 901 F.2d 585, 597 (7th Cir. 1990)(Emphasizing that, if the information contained in the warrant affidavit is too old, “it is considered stale and probable cause no longer exists”). “Age alone, however, does not determine staleness.” Harvey, 2 F.3d at 1322. See also United States v. Williams, 897 F.2d 1034, 1039 (10th Cir. 1990), cert. denied, 500 U.S. 937 (1991)(“The determination of probable cause is not merely an exercise in counting the days or even months between the facts relied on and the issuance of the warrant”); United States v. Spikes, 158 F.3d 913, 923 (6th Cir. 1998), cert. denied, 525 U.S. 1086 (1999)(noting “the function of a staleness test in the search warrant context is not to create an arbitrary time limitation within which discovered facts must be presented to a magistrate”)(citation omitted), *but see* U.S. v. Hython, 443 F.3d 480 (6th Cir. 2006) (*Leon* good-faith exception inapplicable where no reasonable officer could conclude that affidavit, which failed to allege any dates of drug transactions, established probable cause).
- b. **Whether the Criminal Activity is Continuing.** “The passage of time is less significant when there is cause to suspect continuing criminal activity.” Ozar, 50 F.3d at 1446. See also Greene, 250 F.3d at 481 (“Evidence of ongoing criminal activity will generally defeat a claim of staleness”); United States v. Collins, 61 F.3d 1379, 1384 (9th Cir.), cert. denied, 516 U.S. 1000 (1995)(Information in affidavit not stale where “more recent information in the affidavit established Collins’ continued, unlawful possession of firearms”); United States v. Pitts, 6 F.3d 1366, 1369-1370 (9th Cir. 1993)(“When the evidence sought is of an ongoing criminal business ... greater lapses of time are permitted if the evidence in the affidavit shows the probable existence of the activity at an earlier time”). As a general rule, “the longer the expected duration of the criminal activity ... the more likely that [information] from the seemingly distant past will be relevant to a current investigation.” United States v. Schaefer, 87 F.3d 562, 568 (1st Cir. 1996).

- c. **The Type of Evidence Sought in the Search.** The issue of staleness must also be considered in light of the type of evidence the officers are seeking. As a general rule, “courts demand less current information if the evidence sought is of the sort that can be reasonably be expected to be kept for long periods of time in the place to be searched.” United States v. McKeever, 5 F.3d 863, 866 (5th Cir. 1993). See also Spikes, 158 F.3d at 923 (Among factors to be considered in staleness determination is “the thing to be seized,” and whether it is “perishable and easily transferable or of enduring utility to its holder”); Schaefer, 87 F.3d at 568 (“The warrant did not target items of transient existence, but, rather, featured chattels of relatively dear value and solid construction (including hardware commonly used in the growing and distribution of marijuana), likely to be in service for several years. Since these items possessed enduring worth and utility, information that might be considered ancient history in considering the probable whereabouts of more transient goods would be timely here”).
- d. **The Nature of the Location to Be Searched.** “The target’s ownership of the real estate to be searched influences the staleness calculus.” Schaefer, 87 F.3d at 568. See also Spikes, 158 F.3d at 923 (Among factors to be considered in staleness determination is “the place to be searched,” and whether this place is a “mere criminal forum of convenience or secure operational base”); United States v. Vaandering, 50 F.3d 696, 700 (9th Cir. 1995)(Court recognized that, “in the case of drug dealers, evidence is likely to be found where the dealers live”); United States v. Jones, 159 F.3d 969, 975 (6th Cir. 1998)(“The recited statements supporting the search warrant and the fact that ‘in the case of drug dealers, evidence is likely to be found where the dealers live,’ ... support a finding of probable cause to support the issuance of the warrant”)(internal citation omitted).
- e. **Anticipatory Search Warrants.** “An anticipatory warrant is a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place.” United States v. Grubbs, 547 U.S. 90, 94 (2006). “There is nothing unreasonable about authorizing a search for tomorrow, not today, when reliable information indicates that, say, the marijuana will reach the house, not now, but then.” United States v. Gendron, 18 F.3d 955, 965 (1st Cir. 1994).
- 1) Two prerequisites of probability must be satisfied.
 - 2) It must be true that if the triggering condition occurs, there is a fair probability that contraband or evidence of a crime will be found in a particular place; and
 - 3) There must also be probable cause to believe that the triggering event will occur. Grubbs, 547 U.S. at 96-97.

- b. **The warrant may not be executed unless and until the triggering event occurs.** The triggering event must be described in the affidavit, and must be something more than the mere passage of time. Grubbs, 547 U.S. at 96.
 - c. **The Fourth Amendment's particularity requirement does not require the triggering condition to be described in the warrant itself.** The Fourth Amendment does not set forth some general particularity requirement. It specifies only two matters that must be particularly described in the warrant: "the place to be searched" and "the persons or things to be seized." The United States Supreme Court has previously rejected efforts to expand the scope of this provision to embrace unenumerated matters. Grubbs, 547 U.S. at 97.
4. **Particularity and the Place To Be Searched.** Under the Fourth Amendment, the affidavit and warrant must particularly describe the place to be searched. "[T]he task of a judge issuing a search warrant is to determine if a warrant sufficiently describes the place to be searched, enabling the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that other premises might be mistakenly searched." United States v. White, 356 F.3d 865, 868-69 (8th Cir. 2004).
- a. **The Particular Description of the Place to Be Searched Need Not Be 100% Technically Accurate.** In describing the place to be searched with particularity, a law enforcement officer should be as technically accurate as possible. However, 100% technical accuracy is not required. Instead, "[p]ractical accuracy rather than technical precision controls the determination of whether a search warrant adequately describes the premises to be searched." United States v. Lora-Solano, 330 F.3d 1288, 1293 (10th Cir. 2003). See also United States v. Thomas, 263 F.3d 805, 807 (8th Cir. 2001), cert. denied, 534 U.S. 1146 (2002) (In upholding warrant under good faith where wrong address found to be "clerical error;" court noted "[t]here are several cases in this circuit finding the particularity requirement satisfied although the description on the search warrant in question was not entirely accurate"); United States v. Pelayo-Landero, 285 F.3d 491, 496 (6th Cir. 2002) ("An error in description does not ... automatically invalidate a search warrant"); United States v. Addair, 168 F.3d 483, at *4 (4th Cir. 1998), cert. denied, 526 U.S. 1105 (1999) (per curiam) ("An erroneous description or a factual mistake in the search warrant will not necessarily invalidate the warrant and the subsequent search"). Examples of errors in the description of the place to be searched that typically arise include:

- 1) **An Incorrect Address.** Generally speaking, “[a] technically wrong address does not invalidate a warrant if it otherwise describes the premises with sufficient particularity so that the police can ascertain and identify the place to be searched.” Lora-Solano, 330 F.3d at 1293. See also United States v. Durk, 149 F.3d 464, 465-66 (6th Cir. 1998)(Warrant upheld even though house numbers in the warrant had been transposed from “4216” to “4612”). Law enforcement officers, however, may not make changes to the warrant, application, or affidavit once the warrant has been issued by a judicial officer. Instead, the law enforcement officer should submit any desired amendment or alteration to a judicial officer for approval. U.S. v. Hang Le-Thy Tran, 433 F.3d 472 (6th Cir. 2006) (finding description of place to be searched legally sufficient despite typographical error in address, but noting officer had no legal authority to make the correction to the warrant or accompanying affidavit).
- 2) **Incorrect Directions to the Property Are Given.** A warrant may still be sufficiently particular even though directions provided to the property later turn out to be inaccurate or incomplete. See, e.g., Durk, 149 F.3d at 465-66 (Warrant upheld even though “description of Durk’s house as ‘3 houses to the **east** of Grandview’” was incorrect, as “it was three houses to the **west** of Grandview”)(emphasis added); United States v. Rogers, 150 F.3d 851, 855 (8th Cir. 1998), cert. denied, 525 U.S. 1113 (1999)(Warrant upheld even though directions in “affidavit omitted the final turn that the officers had to make in order to find Rogers’ property, and that without this final direction, the search warrant could have led officers to either the Rogers property or the neighboring ... property”).

- b. **The Standard for Testing the Sufficiency of a Warrant's Description is "Reasonable Certainty."** "The test for determining the adequacy of the description of the location to be searched is whether the description is sufficient 'to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premise might be mistakenly searched.'" United States v. Pervaz, 118 F.3d 1, 9 (1st Cir. 1997)(citation omitted). *See also* Lora-Solano, 330 F.3d at 1293 (Same); Pelayo-Landero, 285 F.3d at 496 (Same). Stated differently, the description provided must be "such that the officer with a search warrant can with **reasonable effort** ascertain and identify the place intended." Steele v. United States, 267 U.S. 498, 503 (1925)(emphasis added). *See also* United States v. Bieri, 21 F.3d 811, 815 (8th Cir.), cert. denied, 513 U.S. 878 (1994)("The warrant must also enable the searcher to locate and identify the premises with reasonable effort"). "To satisfy the particularity requirement, then, the description of the place to be searched must not be so broad as to allow the search of places for which probable cause to search has not been demonstrated, or so vague that an executing officer might mistakenly search a place for which authorization was not granted." United States v. Petti, 973 F.2d 1441, 1444 (9th Cir. 1992), cert. denied, 507 U.S. 1035 (1993). An officer who knows – or should know – that the warrant fails to particularly describe the place to be searched cannot legally execute the warrant. Jones v. Wilhelm, 425 F.3d 455, 465 (7th Cir. 2005) ("Where an officer executing a warrant knows or should have known that a warrant, which was valid when issued, now lacks the necessary particularity, then that officer cannot legally execute the warrant. Furthermore, if an officer obtains information while executing a warrant that puts him on notice of a risk that he could be targeting the wrong location, then the officer must terminate his search.")
- c. **Particular Descriptions of Premises.** In describing with specificity the premises to be searched, numerous issues may arise. Some of the more common are addressed below.
- 1) **The Specific Description of a Premises Differs for Urban and Rural Premises.** "The requisite specificity of a description differs for rural and urban areas and depends heavily on the facts of each case." United States v. Langston, 970 F.2d 692, 703 (10th Cir.), cert. denied, 506 U.S. 965 (1992). *See also* United States v. Williams, 687 F.2d 290, 293 (9th Cir. 1982)("The necessary specificity of the description will differ as between urban and rural areas and depends heavily upon the factual circumstances of each case").

- 2) **Multi-Occupancy Buildings.** “A search warrant for an apartment house or hotel or other multiple-occupancy building will usually be held invalid if it fails to describe the particular subunit to be searched with sufficient definiteness to preclude a search of one or more subunits indiscriminately.” 2 W. LaFave, *Search and Seizure* § 4.5(b), p. 526 (3d ed. 1996). *See also, United States v. Busk*, 693 F.2d 28, 31 (3d Cir. 1982) (“A warrant authorizing entry into all apartments in a multiple dwelling house when probable cause has been shown for the search of only one of them does not satisfy the particularity requirement of the Fourth Amendment”); *United States v. Hinton*, 219 F.2d 324, 326 (7th Cir. 1955)(“A warrant which describes an entire building when cause is shown for searching only one apartment is void”).
- a) **Where Multi-Occupancy Building Appears to be Single-Occupancy From Outside.** “Some courts have recognized a significant exception to the above rule: If the building in question from its outward appearance would be taken to be a single-occupancy structure and neither the affiant nor other investigating officers nor the executing officers knew or had reason to know of the structure’s actual multiple-occupancy character until execution of the warrant was underway, then the warrant is not defective for failing to specify a subunit within the named building.” 2 W. LaFave, *Search and Seizure* § 4.5(b), p. 529 (3d ed. 1996). *See, e.g., United States v. Logan*, 998 F.2d 1025, 1032 (D.C. Cir. 1993)(Warrant valid where “the officers had no reason to suspect that the house was not a single family residence when they applied for the warrant” and “there were no signs advertising rooms for rent, no rows of mailboxes, [and] no multiple listing of names at the front door”); *United States v. Kyles*, 40 F.3d 519, 524 (2d Cir. 1994), cert. denied, 514 U.S. 1044 (1995) (Court upheld search warrant because agents “had no reason to believe” defendant’s room was a separate residence; “factors that indicate a separate residence include separate access from the outside, separate doorbells, and separate mailboxes”); *United States v. Owens*, 848 F.2d 462 (4th Cir. 1988) (officers entered the wrong apartment in good faith, where officers entered the only apartment fitting the description in the warrant and had no reason to believe the description was inaccurate.)

- b) **Where Multiple Occupants Share a Single Dwelling, a Search of the Entire Residence is Proper.** “A search warrant for the entire premises of a single family residence is valid, notwithstanding the fact that it was issued based on information regarding the alleged illegal activities of one of several occupants of a residence.” United States v. Ayers, 924 F.2d 1468, 1480 (9th Cir. 1991). *See also United States v. Butler*, 71 F.3d 243, 249 (7th Cir. 1995)(Where entire building is a single unit, “a finding of probable cause as to a portion of the premises is sufficient to support a search of the entire structure”); 2 W. LaFave, *Search and Seizure* § 4.5(b), p. 532 (3d ed. 1996)(“In the community-occupation situation, the courts have held that a single warrant describing the entire premises so occupied is valid and will justify search of the entire premises”).
- d. **Particular Description of Persons.** “The general rule, of course, is essentially the same as that ... for other types of search warrants: the individual to be searched must be described with such particularity that he may be identified with reasonable certainty. The person’s name, if known, should be set forth, but a name is not essential in all cases. Description of the individual by an alias, family relationship to another named person or even as “‘John Doe’ will suffice when other facts, such as physical description and location, are also included.” 2 W. LaFave, *Search and Seizure* § 4.5(e), p. 538 (3d ed. 1996). *See, e.g., United States v. Espinosa*, 827 F.2d 604, 607, 611 (9th Cir. 1987), *cert. denied*, 485 U.S. 968 (1988)(Warrant that referred to defendant as “a male Latin, name unknown, referred to in affidavit as John Doe #1,” and described him as a “male Latin, approximately 35 years of age, 5’8”/5’10”, approximately 200 pounds with black hair and black full beard,” held sufficiently particular because “the warrant and the accompanying, incorporated affidavit left the officers with no discretion as to whom to search”); United States v. Ferrone, 438 F.2d 381, 389 (3d Cir.), *cert. denied*, 402 U.S. 1008 (1971)(Warrant that described “John Doe, a white male with black wavy hair and stocky build observed using the telephone in Apartment 4-C, 1806 Patricia Lane, East McKeesport, Pennsylvania” held valid because “the physical description of appellant, coupled with the precise location at which he could be found, was sufficient”).
- b. **Particular Description of Vehicles.** The particular description of a vehicle should incorporate as many identifying facts about the vehicle as can be obtained. Among some of the more common are:
- 1) Name of Owner;
 - 2) Make and Model of the Vehicle;
 - 3) Year of the Vehicle;

- 4) Color of the Vehicle;
- 5) License Number of the Vehicle; and
- 6) Location of the Vehicle.

Quite clearly, rather detailed descriptions of vehicles listing a number of identifying characteristics together ... are more than sufficient." 2 W. LaFave, *Search and Seizure* § 4.5(d), p. 538 (3d ed. 1996).

6. **The "Person or Things" to Be Seized Must Also Be Described With Particularity.** As noted above, the Fourth Amendment requires that a warrant particularly describe "the person or thing to be seized." In essence, the Warrant clause has two distinct requirements contained in it. "First, [the warrant] must describe the place to be searched or things to be seized with sufficient particularity, taking account of the circumstances of the case and the types of items involved." United States v. Gourde, 382 F.3d 1003, 1008 (9th Cir. 2004)(citation omitted), *rev'd on other grounds by United States v. Gourde*, 440 F.3d 1065 (9th Cir. 2006). And second, "it must be no broader than the probable cause on which it is based." *Id.* "The constitutional standard for the particularity of a search warrant is that the language must be sufficiently definite to enable the searcher to reasonably ascertain and identify the things authorized to be seized." United States v. Saunders, 957 F.2d 1488, 1491 (8th Cir.), *cert. denied*, 506 U.S. 889 (1992). "The requirement of particularity arises out of a hostility to the Crown's practice of issuing "general warrants" taken to authorize the wholesale rummaging through a person's property in search of contraband or evidence." United States v. Upham, 168 F.3d 532, 535 (1st Cir.), *cert. denied*, 527 U.S. 1011 (1999). "In testing whether a specific warrant meets the particularity requirement, a court must inquire whether an executing officer reading the description in the warrant would reasonably know what items are to be seized." United States v. Kimbrough, 69 F.3d 723, 727 (5th Cir. 1995), *cert. denied*, 517 U.S. 1157 (1996).
- c. **The Particularity Requirement Serves Three Purposes.** Courts have noted three distinct rationales underlying the particularity requirement of the Fourth Amendment.
 - 1) **The Particularity Requirement Limits the Discretion of the Officer(s) Executing the Warrant.** "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." Marron v. United States, 275 U.S. 192, 196 (1927). *See also Greene*, 250 F.3d at 476-77 ("Particularity 'eliminates the danger of unlimited discretion in the executing officer's determination of what is subject to seizure'").

- 2) **The Particularity Requirement Informs the Subject What the Officers Are Entitled to Take.** “The requirement that the warrant itself particularly describe the material to be seized is not only to circumscribe the discretion of the executing officers but also to inform the person subject to the search and seizure what the officers are entitled to take.” In re Application of Lafayette Academy, Inc. v. United States, 610 F.2d 1, 5 (1st Cir. 1979).
- 3) **The Particularity Requirement Defines the Scope of the Search That May Be Conducted.** “The particularity requirement also ensures that a search is confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause.” United States v. Janus Indus., 48 F.3d 1548, 1554 (10th Cir.), cert. denied, 516 U.S. 824 (1995)(citation and internal brackets omitted). See also United States v. Weber, 923 F.2d 1338, 1342 (9th Cir. 1991)(Particular description required “since vague language can cause the officer performing the search to seize objects on the mistaken assumption that they fall within the magistrate’s authorization”)(internal citations and quotations omitted).
- See also Doe v. Groody, 361 F.3d 232, 239 (3rd Cir. 2004)(“The requirement of a particular description *in writing* accomplishes three things. First, it memorializes precisely what search or seizure the issuing magistrate intended to permit. Second, it confines the discretion of the officers who are executing the warrant. Third, it ‘informs the subject of the search what can be seized’”)(internal citations and brackets omitted)(emphasis in original).
- b. **Particular Descriptions of Various Types of Objects.** “The specificity required in a warrant varies depending on the circumstances of the case and the type of items involved.” United States v. Spilotro, 800 F.2d 959, 963 (9th Cir. 1986). See also Kimbrough, 69 F.3d at 727 (“In circumstances where detailed particularity is impossible, generic language is permissible if it particularizes the types of items to be seized”); United States v. Ables, 167 F.3d 1021, 1033 (6th Cir.), cert. denied, 527 U.S. 1027 (1999)(Noting “the degree of specificity required is flexible and will vary depending on the crime involved and the types of items sought”). Described below are some particularity concerns regarding various types of objects, such as contraband or First Amendment materials.

- 1) **Books or Other First Amendment Materials.** "The constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain." Roaden v. Kentucky, 413 U.S. 496, 504 (1973)[*citing* Marcus v. Search Warrant of Property, 367 U.S. 717 (1961) and A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964)]. See also Kimbrough, 69 F.3d at 727 ("In cases where warrants seek to seize material presumptively protected by the First Amendment, the level to which the items to be seized must be particularly described is heightened").
- 2) **Contraband.** When particularly describing contraband, much more latitude is given to an officer than when describing other types of objects. "A warrant describing items to be seized in broad and generic terms may be valid if the description is as specific as circumstances and nature of the activity under investigation permit." United States v. Emmons, 24 F.3d 1210, 1216 (10th Cir. 1994)(citation and internal quotation omitted). So, for example, "if the purpose of the warrant is to seize illicit property or contraband ... a general reference is permissible." United States v. Campbell, 256 F.3d 381, 389 (6th Cir.), cert. denied, 534 U.S. 1032 (2001). See, e.g., Janus Indus., 48 F.3d at 1554 (In drug paraphernalia case, court found this type of criminal activity "makes it difficult to list with great particularity the precise items desired to be seized which evidence such activity"); United States v. Spears, 965 F.2d 262, 277 (7th Cir.), cert. denied, 506 U.S. 989 (1992)("The terms 'controlled substances' and 'materials for packaging controlled substances' are sufficiently specific on their face"); United States v. Carpenter, 341 F.3d 666, 670 (8th Cir. 2003)("We have not clearly defined a degree of specificity or manner of description that is required to properly set forth a drug quantity for the purpose of establishing probable cause, nor do we believe it is wise to do so").

- 3) **Child Pornography.** In situations where officers are seeking to search for child pornography, a description of the items as “child pornography,” “sexual conduct between adults and minors,” or as material “depicting minors ... engaged in sexually explicit activity” will generally suffice to meet the particularity requirement of the Fourth Amendment. In these situations, “the words used in the warrant describe[] the material sought in such a way that no expert training or experience was needed to clarify and limit their meaning.” United States v. Hall, 142 F.3d 988, 996 (7th Cir. 1998). See Kimbrough, 69 F.3d at 727-28 (“Identification of visual depictions of minors engaging in sexually explicit conduct ... leaves little latitude to the officers”); United States v. Layne, 43 F.3d 127, 133 (5th Cir.), cert. denied, 514 U.S. 1077 (1995) (Holding that phrase “child pornography” as used in the search warrant in the case “was sufficiently particular in that “[p]olice officers executing either warrant would be sufficiently guided in their discretion to know what items could be seized”); United States v. Hurt, 795 F.2d 765, 772 (9th Cir. 1986), cert. denied, 484 U.S. 816 (1987) (Holding warrant particularly described the material to be seized where it authorized search for any material “depicting minors (that is, persons under the age of 16) engaged in sexually explicit activity”).
- 4) **Stolen Property.** “Courts have held that a warrant referring to stolen property of a certain type is insufficient if that property is common.” Campbell, 256 F.3d at 388-389. See also Spilotro, 800 F.2d at 965 (Description of “gemstones and other items of jewelry” found impermissibly broad).
- c. **Particularity and “All Persons” Search Warrants.** An “all persons” search warrant is one that “authoriz[es] the search of every person on a stated premises.” United States v. Guadarrama, 128 F. Supp. 2d 1202, 1206 (E.D. Wis. 2001). Whether an “all persons” warrant is valid under the Fourth Amendment has engendered considerable debate among the courts, both state and federal. “Only a smattering of federal courts have addressed the difficulties presented by the inclusion of ‘all persons’ language in a premises search warrant, and a few others have mentioned it in passing. The most extensive treatment of the question, by far, has been given in the state courts.” Owens v. Lott, 372 F.3d 267, 274 (4th Cir. 2004) (internal citations omitted). In sum, two approaches have been formed by the courts that have addressed the issue.

- 2) **The Majority View is That “All Persons” Warrants Are Not Per Se Unconstitutional.** “[A] majority of the courts have rejected the idea that an ‘all persons’ warrant could never under any circumstances be constitutional.” *Id.* at 275. Thirty jurisdictions adhere to this view, which was expressed in the leading case on this issue, *State v. De Simone*, 288 A.2d 849 (N.J. 1972). This view holds that “an ‘all persons’ search warrant is authorized under the Fourth Amendment only if the supporting affidavit establishes probable cause that evidence of illegal activity will be found upon every person likely to fall within the warrant’s scope.” *Guadarrama*, 128 F. Supp. 2d at 1207 (collecting cases). The federal courts that have addressed “all persons” warrants have used this standard. See *Owens*, 372 F.3d at 276 (“We agree that the majority view, as articulated in *De Simone*, correctly holds that an ‘all persons’ warrant can pass constitutional muster if the affidavit and information provided to the magistrate supply enough detailed information to establish probable cause to believe that all persons on the premises at the time of the search are involved in criminal activity”); *Guadarrama*, 128 F. Supp. 2d at 1212 (Adopting *De Simone* as the standard for determining validity of “all persons” warrants); *Marks v. Clarke*, 102 F.3d 1012, 1029 (9th Cir. 1996)(“[W]e believe that a warrant to search ‘all persons present’ for evidence of a crime may only be obtained when there is reason to believe that all those present will be participants in the suspected criminal activity”); *United States v. Shields*, 1999 U.S. App. LEXIS 2496, at *7 (10th Cir.) (unpublished), *cert. denied*, 528 U.S. 839 (1999)(“The crucial question in assessing the validity of an “all persons” warrant is whether there is a ‘sufficient nexus among the criminal activity, the place of the activity, and the persons in the place to establish probable cause’”)(citation omitted); *United States v. Graham*, 563 F. Supp. 149, 151 (W.D.N.Y. 1983)(Upholding seizure of evidence pursuant to “all persons” warrant because affidavit established probable cause to search all persons found in the place to be searched).

- 3) **The Minority View is That “All Persons” Warrants Are Facially Unconstitutional.** The minority view on “all persons” warrants, “held or suggested by eight jurisdictions, is that ‘all persons’ warrants are facially unconstitutional because of their general resemblance to general warrants.” Guadarrama, 128 F. Supp. 2d at 1207. See, e.g., State v. Lewis, 566 P.2d 678, 680 (Ariz. 1977)(dicta)(Issuance of “all persons” warrant “would authorize a general warrant by which large numbers of persons could be searched without naming them and would be an unreasonable search under the Constitution of the United States”); State v. Cochran, 217 S.E. 2d 181, 183-84 (Ga. Ct. App. 1975)(Holding “a warrant to search designated premises will not authorize the search of every individual who happens to be on the premises,” and that “[w]arrants ‘which sweep so broadly and with so little discrimination are obviously deficient’”)(internal citations omitted).

NOTE: It would be fair to say that, “[t]he more public a place, the less likely a search of all persons will be sustained.” Guadarrama, 128 F. Supp. 2d at 1212. In fact, “‘all persons’ warrants for public places are almost never sustainable under De Simone, because of the ‘substantial likelihood that a person with no connection to criminal wrongdoing might be subjected to search.’” Id. [*citing State v. Kinney*, 698 N.E. 2d 49, 54 (Ohio 1998)]. Nevertheless, the standard set out in De Simone “does not *automatically* authorize ‘all persons’ warrants for non-public places, especially private residences.” Id. at n.14 (emphasis added). This is because “‘[i]nnocent persons are likely to be present in a residence, even if there is probable cause that the residence also contains evidence of illegal activity.’” Id. In fact, the Ninth Circuit “has held that ‘all persons’ warrants are never constitutional for ‘a raid on any family home where innocent family members or friends might be residing or visiting.’” Id. (*citing Marks*, 102 F.3d at 1029).

5. The Warrant Need Not Describe the Manner of Execution

“The Fourth Amendment does not set forth some general particularity requirement. It specifies only two matters that must be particularly described in the warrant: ‘the place to be searched’ and ‘the persons or things to be seized.’” United States v. Grubbs, 126 S.Ct. 1494, 1500-1501 (2006). Thus, there is no constitutional requirement that the language in the warrant or its attachments specify the manner in which the warrant is to be executed.

Note, however, that agents seizing computers and storage media should explain in the affidavit why an off-site search of the media will be necessary. Failure to do so may render the warrant overbroad, in that it allows agents to seize and remove voluminous amounts of material that may be outside the scope of the warrant. See United States v. Hill, 459 F.3d 966 (9th Cir. 2006).

8. **Under Rule 41(c) of the Federal Rules of Criminal Procedure, Search Warrants Can Authorize the Seizure of Five Different Types of Items.** Rule 41(c) provides that “a warrant may be issued for any of the following”:

- a. Evidence of a crime;
- b. Contraband;
- c. Fruits of crime, or other items illegally possessed;
- d. Property designed for use, intended for use, or used in committing a crime; or
- e. A person to be arrested or a person who is unlawfully restrained.

In sum, the Fourth Amendment requires that there be “a nexus - automatically provided in the case of fruits, instrumentalities or contraband - between the item to be seized and criminal behavior.” Warden v. Hayden, 387 U.S. 294, 307 (1967).

6. **False or Misleading Information in the Affidavit.** In Franks v. Delaware, 438 U.S. 154 (1978), “the Supreme Court addressed at length whether a false statement by a government affiant invalidates a search [or arrest] warrant.” United States v. Hammett, 236 F.3d 1054, 1058 (9th Cir.), cert. denied, 534 U.S. 866 (2001). In sum, before a warrant is issued, the Fourth Amendment requires a truthful factual showing in the affidavit used to establish probable cause. See Franks, 438 U.S. at 165-66 (“When the Fourth Amendment demands a factual showing sufficient to compromise ‘probable cause,’ the obvious assumption is that there will be a truthful showing”). As noted by the Supreme Court:

"where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." Franks, 438 U.S. at 155-156.

See also United States v. Salter, 358 F.3d 1080, 1085 (8th Cir. 2004)("Police cannot obtain valid search warrants where they knowingly or recklessly provide misinformation to a magistrate who issues a warrant, unless probable cause exists when the affidavit is properly reconstructed with truthful information"); United States v. Basham, 268 F.3d 1199, 1204 (10th Cir. 2001), cert. denied, 535 U.S. 945 (2002)("It is a violation of the Fourth Amendment for an affiant to knowingly and intentionally, or with reckless disregard for the truth, make a false statement in an affidavit. ... Where a false statement is made in an affidavit for a search warrant, the search warrant must be voided if the affidavit's remaining content is insufficient to establish probable cause")(internal citation omitted).

- a. **The Requirement for a Franks Hearing.** A defendant who seeks to have evidence suppressed under the rule set out in Franks must satisfy a two-part test. First, the defendant must show “that the affiant knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that create a falsehood in applying for a warrant.” Sherwood v. Mulvihill, 113 F.3d 396, 399 (3d Cir. 1997). Second, the defendant must show that the false statements or omissions were “material, or necessary, to the finding of probable cause.” Id. “This showing of deliberate or reckless falsehood is ‘not lightly met.’” United States v. Lucca, 377 F.3d 927, 931 (8th Cir. 2004) (citation omitted). A closer examination of this two-part test makes it clear that, in order to obtain a hearing under Franks, a defendant must make a “substantial preliminary showing” of three separate facts. United States v. Whitley, 249 F.3d 614, 620 (7th Cir. 2001). See also United States v. Rodriguez, 367 F.3d 1019, 1025 (8th Cir. 2004), *vacated and remanded for resentencing by Rodriguez v. United States*, 543 U.S. 1101 (2005) (“Conclusory allegations of falsehood are insufficient to make a substantial preliminary showing that a false statement was intentionally or recklessly included in the affidavit”)(citation omitted); United States v. Merritt, 361 F.3d 1005, 1010 (7th Cir. 2004) *vacated and remanded for resentencing by Merritt v. United States*, 543 U.S. 1099 (2005) (noting defendant must make “a substantial preliminary showing, typically in a motion to suppress” of three separate facts).

- 1) **First, the Defendant Must Show the Warrant Affidavit Includes a False Statement or Material Omission.** The first step in any Franks claim is that the defendant must make a showing that the warrant affidavit has either a false statement in it or that a material omission has occurred.

- a) **False Statements.** First, the defendant may meet the first step in a Franks claim by showing that the affidavit includes false information. Franks, 438 U.S. at 155. See also United States v. Gladney, 48 F.3d 309, 313 (8th Cir. 1995)(Noting that, to prevail on a Franks claim, the defendant must show, *inter alia*, “that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included in the affidavit”)(citation omitted).

b) **Material Omissions.** In addition to a false statement in the affidavit, "a material omission of information may also trigger a Franks hearing." United States v. Castillo, 287 F.3d 21, 25 (1st Cir. 2002). See also United States v. Stropes, 387 F.3d 766, 771 (8th Cir. 2004)("Under Franks, if an officer omits critical information from a search warrant application and obtains a warrant, the resultant search may be unreasonable under the Fourth Amendment"); United States v. Ketzbeck, 358 F.3d 987, 990 (8th Cir. 2004)("Omissions likewise can vitiate a warrant ..."); United States v. Tomblin, 46 F.3d 1369, 1377 (5th Cir. 1995)("Omissions ... can constitute improper government behavior") (citation omitted). "By reporting less than the total story, an affiant can manipulate the inferences a magistrate will draw. To allow a magistrate to be misled in such a manner could denude the probable cause requirement of all real meaning." United States v. Stanert, 762 F.2d 775, 781 (9th Cir. 1985).

2) **Second, the Defendant Must Show That the False Statement or Material Omission was Made Knowingly and Intentionally or With Reckless Disregard For the Truth.** After showing that a false statement or material omission was made, the defendant must show that the false statement or omission was made "knowingly or with reckless disregard for the truth." Franks, 483 U.S. at 155. See also Rodriguez, 367 F.3d at 1025-26 ("When no proof is offered that an affiant deliberately lied or recklessly disregarded the truth, a Franks hearing is not required")(citation omitted).

a) **Knowingly and Intentionally.** "Knowingly and intentionally" requires a separate analysis for assertions and omissions.

- (1) **Assertions.** The Supreme Court does not require that all statements in an affidavit be completely accurate. Instead, the Court simply requires that the statements be "believed or appropriately accepted by the affiant as true." Franks, 438 U.S. at 165. As stated by one court: "The fact that a third party lied to the affiant, who in turn included the lies in a warrant affidavit does not constitute a Franks violation. A Franks violation occurs only if the affiant knew the third party was lying, or if the affiant proceeded in reckless disregard of the truth." United States v. Jones, 208 F.3d 603, 607 (7th Cir. 2000). Accordingly, "misstatements resulting from negligence or good faith mistakes will not invalidate an affidavit which on its face establishes probable cause." Hammett, 236 F.3d at 1058 (citation omitted). See also Franks, 438 U.S. at 171 ("Allegations of negligence or innocent mistake are insufficient"); United States v. Colonna, 360 F.3d 1169, 1174 (10th Cir. 2004)("However, a misstatement in an affidavit that is merely the result of simple negligence or inadvertence ... does not invalidate a warrant."); United States v. Clapp, 46 F.3d 795, 799 (8th Cir. 1995)("Mere negligence or innocent mistake is insufficient to void a warrant") (citation omitted); United States v. Capozzi, 347 F.3d 327, 332 (1st Cir. 2003), cert. denied, 540 U.S. 1168, 124 S. Ct. 1187 (2004)("Mere negligence or inattention to detail in preparing an affidavit does not deprive the government of the benefits of the Leon exception").

- (2) **Omissions.** With regards to omissions, the defendant must show “that the affiant omitted facts with the intent to make ... the affidavit misleading.” United States v. LaMorie, 100 F.3d 547, 555 (8th Cir. 1996)... *See also* Clapp, 46 F.3d at 799 (“The defendant must show that the facts were omitted with the intent to make ... the affidavit misleading”); Gladney, 48 F.3d at 313 (same). As with assertions, negligent omissions will not invalidate a warrant... *See, e.g.,* Ketzeback, 358 F.3d at 990 (While “every factual omission is intentional insofar as the omission is made knowingly,” the officer must have omitted the facts “with the intent to mislead or in reckless disregard of the omissions’ misleading effect” to invalidate a warrant); United States v. McCarty, 36 F.3d 1349, 1356 (5th Cir. 1994) (“Negligent omissions will not undermine the affidavit”).
- b) **Reckless Disregard for the Truth.** “Reckless disregard for the truth means different things when dealing with omissions and assertions.” Wilson v. Russo, 212 F.3d 781, 787 (3d Cir. 2000).
- (1) **Assertions.** Assertions are made with “reckless disregard for the truth” when “viewing all the evidence, the affiant must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported.” Clapp, 46 F.3d at 801 n.6.
- (2) **Omissions.** Omissions are made with “reckless disregard for the truth” when a law enforcement officer omits facts that “any reasonable person would have known ... this was the kind of thing the judge would wish to know.” United States v. Jacobs, 986 F.2d 1231, 1235 (8th Cir. 1993). *See also* Wilson, 212 F.3d at 788 (same).

(3) **Third, the Defendant Must Show That the Allegedly False Statement is Necessary to a Finding of Probable Cause.** Finally, the plaintiff must show that the false statements or omissions were "material" to a finding of probable cause. "Disputed issues are not material if, after crossing out any allegedly false information and supplying any omitted facts, the 'corrected affidavit' would have supported a finding of probable cause." Velardi v. Walsh, 40 F.3d 569, 574 (2d Cir. 1994)(citation omitted). Thus, "even if the defendant makes a showing of deliberate falsity or reckless disregard for the truth by law enforcement officers, he is not entitled to a hearing if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause." United States v. Dickey, 102 F.3d 157, 161-162 (5th Cir. 1996) (citation omitted). See also Rodriguez, 367 F.3d at 1026 (Noting that, "in order to establish a Franks violation," the defendant must "show that the remaining content of the affidavit was insufficient to establish probable cause")(citation omitted); United States v. Higgins, 995 F.2d 1, 4 (1st Cir. 1993)("When a defendant offers proof of an omission, 'the issue is whether, even had the omitted statements been included in the affidavit, there was still probable cause to issue the warrant'")(citation omitted); United States v. Froman, 355 F.3d 882, 889 (5th Cir. 2004)("In determining whether probable cause exists without the false statements a court must 'make a practical, common-sense decision as to whether, given all the circumstances set forth in the affidavit [minus the alleged misstatements], there is a fair probability that contraband or evidence of a crime will be found in a particular place'")(citation omitted).

- b. **Misrepresentations or Omissions By Someone Other Than the Affiant.** In assessing whether Franks applies to misrepresentation or omissions by someone other than the affiant, courts look to whether the provider of the information is a private party or a government official.

- 1) **Information Provided By Private Citizens Generally Cannot Be the Basis for a Franks Claim.** “The deliberate falsity or reckless disregard whose impeachment is permitted ... is only that of the affiant, not of any **nongovernmental** informant.” Franks, 438 U.S. at 171 (emphasis added). Thus, when a private informant or citizen provides information that later turns out to be false or misleading, this “does not present grounds to challenge the search warrant so long as the affiant in good faith accurately represents what the informant told him.” United States v. Wapnick, 60 F.3d 948, 956 (2d Cir. 1995), cert. denied, 517 U.S. 1187 (1996), and cert. denied, 518 U.S. 1021 (1996).
- 2) **Information Provided by Other Government Officials Can Be the Basis for a Franks Claim.** As noted above, the general rule is that a false statement made by a private citizen and reasonably relied upon by the affiant cannot form the basis for a Franks claim. “However, when the informant is himself a government official, a deliberate or reckless omission by the informant can still serve as grounds for a Franks suppression.” Wapnick, 60 F.3d at 956. See also United States v. DeLeon, 979 F.2d 761, 764 (9th Cir. 1992)(“The Fourth Amendment places restrictions and qualifications on the actions of the government generally, not merely on affiants”); Hart v. O’Brien, 127 F.3d 424, 448 (5th Cir. 1997), cert. denied, 525 U.S. 1103 (1999)(Collecting cases and noting agreement “with the reasoning of these circuit courts that a deliberate or reckless misstatement may form the basis for a Franks claim against a government official who is not the affiant”). Such a rule ensures that law enforcement personnel cannot “insulate one officer’s deliberate misstatement merely by relaying it through an officer-affiant personally ignorant of its falsity.” Franks, 438 U.S. at 164 n.6.

N. EPO #14: IDENTIFY CIRCUMSTANCES WHEN A TELEPHONIC SEARCH WARRANT SHOULD BE OBTAINED

1. General Rule – Telephonic Search Warrants May Be Obtained Under **Rule 41(d)(3)** of the Federal Rules of Criminal Procedure. A “judge may wholly or partially dispense with a written affidavit and base a warrant on sworn testimony if doing so is reasonable under the circumstances.” Rule 41(d)(2)(B). In such circumstances, Rule 41(d)(3) of the Federal Rules of Criminal Procedure, titled “Requesting a Warrant By Telephonic or Other Means,” outlines the rules regarding obtaining telephonic search warrants. Subsection (A) of the rule provides, in pertinent part, that:

“A magistrate judge may issue a warrant based on information communicated by telephone or other reliable electronic means.”

2. The Purpose of **Rule 41(d)(3)** Is to Encourage Law Enforcement Officers to Seek Search Warrants in Situations Where They Otherwise Might Not. The purpose of **Rule 41(d)(3)** was "to encourage Federal law enforcement officers to seek search warrants in situations when they might otherwise conduct warrantless searches." United States v. McEachin, 670 F.2d 1139, 1147 (D.C. Cir. 1981)(citation omitted). See also United States v. Cuaron, 700 F.2d 582, 588 (10th Cir. 1983)("The rule's legislative history demonstrates that Congress intended to encourage police to procure telephone warrants where 'the existence of exigent circumstances is a close question and the police might otherwise conduct a warrantless search'").
- a. **The Time Necessary to Obtain a Search Warrant is Relevant in Determining Whether Exigent Circumstances Existed.** "The time necessary to obtain a warrant is relevant to a determination whether circumstances are exigent." Cuaron, 700 F.2d at 589; McEachin, 670 F.2d at 1146 ("We think courts must also consider the amount of time necessary to obtain a warrant by telephone in determining whether exigent circumstances exist"). Further, "warrants obtained by telephone generally take less time to procure than traditional warrants...." Cuaron, 700 F.2d 589; United States v. Whitfield, 629 F.2d 136, 142 (D.C. Cir. 1980), cert. denied, 449 U.S. 1086 (1981)("With telephonic warrants now permissible ... the delay in [obtaining a warrant] may not be long at all"). Accordingly, "trial courts must consider the availability of a telephone warrant in determining whether exigent circumstances existed, unless the critical nature of the circumstances clearly prevented the effective use of any warrant procedure." Cuaron, 700 F.2d at 589 (citation omitted).
- b. **Failing to Obtain a Telephonic Search Warrant Can Result in the Suppression of Evidence.** "Failing to make a good faith attempt to obtain a telephonic warrant or to present evidence showing that a telephonic warrant was unavailable ordinarily requires suppression." United States v. Tarazon, 989 F.2d 1045, 1050 (9th Cir.), cert. denied, 510 U.S. 853 (1993)(citation omitted). See also United States v. Alvarez, 810 F.2d 879, 883 (9th Cir. 1987)(Where agents had a minimum of 90 minutes, court could not "say conclusively that the agents ... could not have complied with [Rule 41(d)(3)]"); United States v. Patino, 830 F.2d 1413, 1416 (7th Cir. 1987), cert. denied, 490 U.S. 1069 (1989) (Where agent waited 30 minutes for backup to arrive before entering home without a warrant, court noted "a telephonic search warrant should have been sought during the thirty-minute period the agent awaited the other officers"); United States v. Santa, 236 F.3d 662 (11th Cir. 2000) (Police should have attempted to obtain a telephonic warrant where police conducted a controlled buy with nearly three hours' notice, there was no evidence that suspects were aware of surveillance, and no evidence to suggest suspects would destroy the drugs before receiving payment).

3. **Who Can Issue Telephonic Search Warrants?** Unlike traditional Federal search warrants issued pursuant to Rule 41, a state court judge may not issue a telephonic search warrant. See Rule 41(d)(3).
4. **There are a Number of Procedural Requirements for Issuance of a Telephonic Search Warrant.** There are a variety of procedural requirements that must be met in order to obtain a telephonic search warrant. It should be remembered that there are actually two warrants involved in a telephonic warrant request: The "original" warrant, completed by the Magistrate Judge, and a "duplicate original warrant," completed by the law enforcement officer involved.
 - a. **First, a "Duplicate" Original Warrant Must Be Prepared.** First, the applicant must prepare a "proposed duplicate original warrant." The duplicate original warrant has to be in writing, although the affidavit does not. See Rule 41(e)(3)(A).
 - b. **Second, the "Duplicate" Original Warrant Must Be Read Verbatim or Transmitted by Reliable Electronic Means to the Magistrate Judge.** Second, the applicant must "read or otherwise transmit the contents of the document verbatim to the magistrate judge." Rule 41(e)(3)(A). This means that the requesting officer may, if the option is available, transmit the duplicate original warrant to the magistrate judge by email or facsimile.
 - c. **Third, the Magistrate Judge Prepares an "Original" Warrant.** Third, pursuant to Rule 41(e)(3)(B), "if the applicant reads the contents of the proposed duplicate original warrant, the magistrate judge must enter those contents into an original warrant." Of course, "the magistrate judge may modify the original warrant." In that case, the judge will direct the applicant to modify the proposed duplicate original warrant accordingly. Rule 41(e)(3)(C).

If the applicant sends the proposed duplicate original warrant to the judge by reliable electronic means, that transmission may serve as the original warrant. If the judge chooses to modify the warrant, he or she must transmit the modified warrant back to the applicant by reliable electronic means or direct the applicant to modify the proposed duplicate original warrant accordingly. Id.
 - d. **Fourth, the Magistrate Judge and the Applicant Shall Sign the Warrants.** Fourth, "upon determining to issue the warrant, the magistrate judge must immediately sign the original warrant, enter on its face the exact date and time it is issued, and transmit it by reliable electronic means to the applicant or direct the applicant to sign the judge's name on the duplicate original warrant." Rule 41(e)(3)(D).
 - e. **Finally, the Time of Execution Must Be Entered on the "Duplicate" Original Warrant.** Finally, upon execution of the warrant, "the officer executing the warrant must enter on its face the exact date and time it is executed." Rule 41(f)(1)(A).

5. **In Situations Involving Telephonic Warrants, There are Recording and Certification Requirements.** In addition to the requirements listed above, the Rule also has recording and certification requirements that must be met.
- a. **The Applicant Must Immediately Be Placed Under Oath or Affirmation.** "Upon learning that an applicant is requesting a warrant, a magistrate judge must... place under oath the applicant and any person on whose testimony the application is based." Rule 41(d)(3)(B)(i); United States v. Rome, 809 F.2d 665, 667 (10th Cir. 1987)("The rule's requirements are clear ... the caller must be under oath from the inception" of the call).
 - b. **Judge Must Make a Verbatim Record of the Conversation.** Additionally, pursuant to Rule 41(d)(3)(B)(ii), a magistrate judge must "make a verbatim record of the conversation with a suitable recording device, if available, or by a court reporter, or in writing."
 - c. **The Recording of the Conversation Must Be Certified.** Finally, "the magistrate judge must have any recording or court reporter's notes transcribed, certify the transcription's accuracy, and file a copy of the record and the transcription with the clerk. Any written verbatim record must be signed by the magistrate judge and filed with the clerk." Rule 41(d)(3)(C). "The purpose of transcribing the taped conversation and certifying the transcription is to give reviewing courts an accurate account of the facts originally presented to the magistrate which resulted in the issuance of a search warrant." United States v. Loyd, 721 F.2d 331, 333 (11th Cir. 1983).

What happens if the warrant is never reduced to a written form? Fed. R. Crim. P. 41(e)(3)(A) requires, among other things, that an investigator who requests a telephonic warrant and the judge who approves it to each create written copies of the authorization for the search. Neither happened in United States v. Cazares-Olivas, 2008 U.S. App. LEXIS 1851 (7th Cir. 2008). The other requirements for telephonic warrants were satisfied, however, where the agent was under oath, and the magistrate judge determined the existence of probable cause and kept a recording of the telephone call. The Seventh Circuit, relying upon the Supreme Court's reasoning in Hudson v. Michigan, (2006), held that depriving the truth-seeking process of the fruit of the searches is not justified by the marginal deterrent value that suppression would have in these circumstances. "Had the magistrate judge written out and signed a warrant after hanging up the phone, everything would have proceeded exactly as it did. The agents would have conducted the same search and found the same evidence." Cazares-Olivas, 2008 U.S. App. LEXIS 1851 at *6. The defendants in this case "received the benefit of a magistrate judge's impartial evaluation before the search occurred," id. at *8, which is what the Fourth Amendment requires.

O. **EPO #15: IDENTIFY THE LEGAL REQUIREMENTS FOR EXECUTING A SEARCH WARRANT, E.G., AUTHORITY TO EXECUTE; TIME OF ENTRY; METHOD OF ENTRY; LOCATIONS ON A PREMISES WHICH MAY BE SEARCHED; DURATION OF THE SEARCH; AND INVENTORY**

1. **Rule 41(d)(2)(A)** of the Federal Rules of Criminal Procedure Dictates Who May Request a Federal Search Warrant. Rule 41(d)(2)(A) of the Federal Rules of Criminal Procedure provides that federal search warrants may be requested by:
 - a. **A Federal Law Enforcement Officer May Request a Federal Search Warrant.** The phrase "federal law enforcement officer" is defined in Rule 41(a)(2)(C) to mean "a government agent (other than an attorney for the government) who is engaged in enforcing the criminal laws and is within any category of officers authorized by the Attorney General to request a search warrant." Of note, law enforcement officers are required to obtain the concurrence of the United States Attorney's Office before applying for a search warrant. Specifically, 28 CFR § 60.1 provides "that only in the very rare and emergent case is the law enforcement officer permitted to seek a search warrant without the concurrence of the appropriate U.S. Attorney's office."

- b. **An Attorney for the Government May Request a Federal Search Warrant.** An “attorney for the government” is defined in Rule 1(b)(1), and includes Assistant United States Attorneys.
2. **Who May Execute a Federal Search Warrant?** Rule 41(e)(1) provides that a search warrant must be issued “to an officer authorized to execute it.” Who such an officer is must be determined by reference to Title 18 U.S.C. § 3105. This section provides as follows: “A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.” As a general rule, the Supreme Court has held that “it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant” Dalia v. United States, 441 U.S. 238, 257 (1979). Issues can arise, however, when non-federal law enforcement officers assist in the execution of a federal search warrant.
- a. **State and Local Law Enforcement Officers May Assist in the Execution of Federal Search Warrants.** State and local law enforcement officers are permitted to assist in the execution of search warrants by § 3105. These officers may be “cross-designated” as federal law enforcement officers, but are not required to be, so long as a federal law enforcement officer is directing the execution of the search warrant. *See, e.g., United States v. Medlin*, 842 F.2d 1194, 1196 (10th Cir. 1988)(Where “local police officers were acting under federal authority and were subject to federal control when they were present at the search pursuant to the warrant issued to the ATF agents,” the statute “does not require that a person assisting an officer in the execution of a warrant be an officer acting within his or her jurisdiction. Consequently, we find that there was nothing impermissible in Deputy Carter’s presence at the Medlin search”).
- b. **Private Citizens May Assist in the Execution of Federal Search Warrants.** “Federal constitutional law does not proscribe the use of civilians in searches. In fact, Congress has explicitly authorized the practice, and courts have repeatedly upheld the practice.” Bellville v. Town of Northboro, 375 F.3d 23, 32 (1st Cir. 2004). “The use of civilians in the execution of federal search warrants is governed by [Title 18 U.S.C. § 3105].” United States v. Sparks, 265 F.3d 825, 831 (9th Cir. 2001).

- c. **Generally, Three Requirements Must Be Met When a Private Citizen Assists in the Execution of a Federal Search Warrant.** Courts addressing this issue have announced various factors that must be taken into account when private citizens assist in the execution of a federal search warrant. In Sparks, *supra*, the court reviewed the various cases dealing with searches by private citizens and came up with three (3) general principles to apply in determining the validity of a search by a private citizen assisting a law enforcement officer in the execution of a search warrant:
- 1) **First, the Civilian's Role Must Be to Aid the Efforts of the Police.** In other words, civilians cannot be present simply to further their own goals. Wilson v. Layne, 526 U.S. 603, 613-14 (1999) (Inviting media to "ride along" on execution of warrant violates the defendant's Fourth Amendment rights); Bellville, 375 F.3d at 33 (Citizen participating in execution of search warrant must "have been serving a legitimate investigative function"); Buonocore v. Harris, 65 F.3d 347, 356 (4th Cir. 1995) ("We have no doubt that the Fourth Amendment prohibits government agents from allowing a search warrant to be used to facilitate a private individual's independent search of another's home for items unrelated to those specified in the warrant. Such a search is not 'reasonable'"); Bills v. Aseltine, 958 F.2d 697, 702 (6th Cir. 1992), cert. denied, 516 U.S. 865 (1995) (suppressing evidence discovered by a security guard who "was present, not in aid of the officers or their mission, but for his own purposes involving the recovery of ... property not mentioned in any warrant"). As one court has noted: "To conclude otherwise would authorize law enforcement officers to invite private individuals to engage in conduct that would constitute trespass were it not conducted under the guise of a search warrant." Buonocore, 65 F.3d at 359.
 - 2) **Second, the Officer Must Be in Need of Assistance.** "Police cannot invite civilians to perform searches on a whim; there must be some reason why a law enforcement officer cannot himself conduct the search and some reason to believe that postponing the search until an officer is available might raise a safety risk." Sparks, 265 F.3d at 832. See also Bellville, 375 F.3d at 33 ("Also, the officers must have some demonstrable need for the presence of the civilian").
 - 3) **Third, the Civilians Must Be Limited to Doing What the Police Had Authority to Do.** Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971); United States v. Cleaveland, 38 F.3d 1092, 1093 (9th Cir. 1995).

- d. **Private Citizen Examples.** The following cases provide examples of when a private citizen may assist a law enforcement officer in the execution of a search warrant under § 3105:
- 1) United States v. Robertson, 21 F.3d 1030, 1034 (10th Cir.), cert. denied, 513 U.S. 891 (1994)(Carjacking victim's presence in defendant's residence was permitted to help identify items covered by warrant);
 - 2) United States v. Schwimmer, 692 F. Supp. 119, 124, 126-27 (E.D.N.Y. 1988)(Holding that government agents lawfully had computer expert help identify items that could be seized under warrant);
 - 3) United States v. Clouston, 623 F.2d 485, 486-87 (6th Cir. 1980)(per curiam)(Holding that government agents properly seized telephone company property identified by assisting telephone company agents, even though warrant did not list telephone company property).
3. **Rule 41(e)(2)(A) and (B) Provide the Requirements For When a Federal Search Warrant May Be Served.** The timeframes in which a search warrant must be served are outlined in Rule 41(e)(2)(A) and (B) of the Federal Rules of Criminal Procedures.
- a. **Federal Search Warrants Must Generally Be Served in the "Daytime."** Rule 41(e)(2)(B) provides that a search warrant "must command the officer to execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time."
- 1) **"Daytime" Defined.** Pursuant to Rule 41(a)(2)(B), "the term 'daytime' means 'the hours between 6:00 a.m. and 10:00 p.m. according to local time.'"
 - 2) **Search Warrants Involving Controlled Substances May Be Served Anytime.** Title 21 U.S.C. § 879 provides that "a search warrant relating to offenses involving controlled substances may be served at any time of the day or night if the judge or United States Magistrate Judge issuing the warrant is satisfied that there is probable cause to believe that grounds exist for the warrant and for its service at such time." Further, the Supreme Court has held that such cases "require no special showing for a nighttime search, other than a showing that the contraband is likely to be on the property or person to be searched at that time." Gooding v. United States, 416 U.S. 430, 458 (1974).

- 3) **Nighttime Service of Search Warrants is Permitted If Reasonable Cause is Shown.** “Nighttime execution of a search warrant is permissible under [Rule 41(e)(2)(B)] ... if nighttime execution is specifically provided for in the warrant and is supported by ‘reasonable cause.’” United States v. Smith, 1991 U.S. App. LEXIS 19748 (6th Cir. 1991) (unpublished). “The federal rule requires explicit authorization for a night search, and ‘reasonable cause shown’ to the issuing magistrate justifying the unusual intrusion of a search at night.” United States v. Searp, 586 F.2d 1117, 1121 (6th Cir. 1978). “The rule recognizes that there are times when a night search is necessary; if, for instance, execution would be impossible in the daytime or the property sought is likely to be destroyed or removed before daylight.” Id. Finally, “[t]he rule requires only some factual basis for a prudent conclusion that the greater intrusiveness of a nighttime search is justified by the exigencies of the situation.” Id. In determining whether a warrant may be executed in the nighttime, courts consider factors similar to those examined when determining the legality of a “no-knock” entry, including:

- a) Danger or Futility;
- b) Inhibition of Effective Crime Investigation; and
- c) Destruction of Evidence.

See, e.g., Colonna, 360 F.3d at 1176 (Nighttime execution of warrant upheld where suspect had prior extensive involvement with law enforcement; concerned citizen expressed fear that suspect would retaliate violently; and children lived in the vicinity of the residence); United States v. Tucker, 313 F.3d 1259, 1265 (10th Cir. 2002)(Noting “the danger of destruction or removal of the evidence is sufficient reason for nighttime execution of a search warrant, in part because such circumstances could even constitute exigent circumstances for a search without a warrant”); United States v. Stefanson, 648 F.2d 1231, 1236 (9th Cir. 1981)(Noting that, “when a search warrant is sought similar exigent circumstances justify an immediate nighttime execution of it”)

- b. **Rule 41(e)(2)(A)** Provides That a Federal Search Warrant Must Be Served Within *** 14 Days of Issuance, Unless a Specific Period of Time is Noted in the Warrant. *** Effective 1 December 2009, Rule 41(e)(2)(A) provides that a search warrant must be served within one of two possible periods of time.

- 1) **Service May Be Required Within a Specified Time.** First, the rule provides for service “within a specified time.” Thus, the search warrant itself may specify when service is required. See, e.g., United States v. Gerber, 994 F.2d 1556 (11th Cir. 1993)(Search warrant obtained on September 12 was drafted to expire on September 13).
 - 2) **Federal Search Warrants Must Be Served Within Fourteen [14] Days of Issuance.** If no specified time period for the search is contained in the warrant itself, the warrant must be served within a period “no longer than 14 days” from the date of issuance.
 - 3) **Tracking Warrants.** Tracking warrants that authorize installation of a tracking device “must command the officer to complete any installation authorized by the warrant within a specified time no longer than 10 calendar days” from the date the warrant was issued. Installation must be performed in the daytime, “unless the judge for good cause expressly authorizes installation at another time.” Rule 41(e)(2)(B)(i)-(ii).
 - 4) **Violations of Rule 41(e)(2)(A) or (B) Generally Do Not Result in Suppression of Evidence.** If a violation of this portion of Rule 41 occurs, it will not automatically result in suppression of any evidence obtained during the execution of the search warrant. “Completing a search shortly after the expiration of a search warrant does not rise to the level of a constitutional violation and cannot be the basis for suppressing evidence seized so long as probable cause continues to exist, and the government does not act in bad faith.” Gerber, 994 F.2d 1560.
4. **Locations On a Premise That May Be Searched.** In United States v. Ross, 456 U.S. 798, 820-821 (1982), the Supreme Court discussed the scope of a search conducted pursuant to a premises search warrant:
- “A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search. Thus, the warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found.”* Id.

See *also* United States v. Evans, 92 F.3d 540, 543 (7th Cir.), cert. denied, 519 U.S. 1020 (1996) (“A warrant to search a house or other building authorizes the police to search any closet, container, or other closed compartment in the building that is large enough to contain the contraband or evidence that they are looking for If they are looking for a canary’s corpse, they can search a cupboard, but not a locket. If they are looking for an adolescent hippopotamus, they can search the living room or garage but not the microwave oven. If they are searching for cocaine, they can search a container large enough to hold a gram, or perhaps less”)(citation omitted); United States v. Nichols, 344 F.3d 793, 798 (8th Cir. 2003) (“A lawful search extends to all areas and containers in which the object of the search may be found”)(citations omitted).

NOTE: In the following sections, the rules regarding where a law enforcement officer may search are discussed. In addressing these issues with the students, it should be noted that, “[w]hile the purposes justifying a police search strictly limit the permissible extent of the search, the [Supreme] Court has also recognized the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants.” Maryland v. Garrison, 480 U.S. 79, 87 (1987). See *also* Brinegar v. United States, 338 U.S. 160, 176 (1949) (“Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability”); Peterson v. Jensen, 371 F.3d 1199, 1203 (10th Cir. 2004) (Same).

- a. **Premise, Outbuildings, Curtilage.** “A search warrant for a residence may include all other buildings and other objects within the curtilage of that residence, even if not specifically referenced in the search warrant.” United States v. Cannon, 264 F.3d 875, 881 (9th Cir. 2001), cert. denied, 534 U.S. 1143 (2002). See *also* United States v. Earls, 42 F.3d 1321, 1327 (10th Cir. 1994), cert. denied, 514 U.S. 1085 (1995) (“The warrant authorizing the search of the premises including the residence on that particular premises permitted the search of the outbuildings within the curtilage of the residence”); United States v. Bonner, 808 F.2d 864, 868 (1st Cir. 1986), cert. denied, 481 U.S. 1006 (1987) (Holding that “warrants authorizing a search of ‘premises’ at a certain address authorize a search of the buildings standing on that land”).

- b. **Generally, Vehicles on the Property to Be Searched May Be Searched Pursuant to a Premises Search Warrant.** "A warrant to search a house or other building authorizes the police to search any closet, container, or other closed compartment in the building that is large enough to contain the contraband or evidence that they are looking for." United States v. Percival, 756 F.2d 600, 612 (7th Cir. 1985). In this regard, "a car parked in a garage is just another interior container, like a closet or a desk." Evans, 92 F.3d at 543. Thus, "if ... the trunk or glove compartment is not too small to hold what the search warrant authorizes the police to look for, they can search the trunk and the glove compartment." Id. In these types of cases, two issues generally arise: First, must the vehicle be located on the curtilage of the home? And second, does this apply to vehicles owned by visitors to the home?

- 1) **The Vehicle Must Be Located on the Curtilage to Fall Under the Authority of the Search Warrant.** To fall under the authority of a search warrant, the vehicle must be parked on the curtilage of the home where the warrant is being served. See United States v. Sturmoski, 971 F.2d 452, 458 (10th Cir. 1992)("A search warrant authorizing a search of a certain premises generally includes any vehicles located ***within its curtilage*** if the objects of the search might be located' in those vehicles")(emphasis added) (citation omitted); United States v. Griffin, 827 F.2d 1108, 1114 (7th Cir. 1987), cert. denied, 485 U.S. 909 (1988); United States v. Asselin, 775 F.2d 445, 447 (1st Cir. 1985); United States v. Bulgatz, 693 F.2d 728, 730 n.3 (8th Cir. 1982), cert. denied, 459 U.S. 1210 (1983); United States v. Napoli, 530 F.2d 1198, 1200-01 (5th Cir.), cert. denied, 429 U.S. 920 (1976).

2) **Ownership of the Vehicle May Also Play a Role in Determining Whether the Vehicle Falls Under the Authority of the Search Warrant.** In United States v. Percival, 756 F.2d 600 (7th Cir. 1985), the Seventh Circuit Court of Appeals held that "a search warrant authorizing a search of particularly described premises may permit the search of vehicles owned or controlled by the owner of, and found on, the premises." Id. at 612. However, in a later case, the court reinterpreted its decision in Percival, holding that whether or not a vehicle on the curtilage may be searched pursuant to a premises warrant "is not tied to ownership." Evans, 92 F.3d at 543. See also United States v. Cole, 628 F.2d 897, 899-900 (5th Cir. 1980), cert. denied, 450 U.S. 1043 (1981)(Truck of a third party who arrived during the execution of a search warrant was validly searched pursuant to the warrant). Taking a somewhat more restrictive view, the Tenth Circuit Court of Appeals In United States v. Gottschalk, 915 F.2d 1459 (10th Cir. 1990), held "the scope of the warrant [includes] those automobiles either actually owned or under the control and dominion of the premises owner or, alternatively, those vehicles which appear, based on objectively reasonable indicia present at the time of the search, to be so controlled. Thus where the officers act reasonably in assuming that the automobile is under the control of the premises owner, it is included in the warrant." Id. at 1461. See also United States v. Duque, 62 F.3d 1146, 1151 (9th Cir. 1995), cert. denied, 519 U.S. 819 (1996)("A search warrant authorizing a search of a particularly described premises may permit the search of vehicles owned or controlled by the owner of, and found on, the premises").

c. **Generally, Containers on the Property to Be Searched May Be Searched Pursuant to a Premises Search Warrant.** "As a general proposition, any container situated within residential premises which are the subject of a validly-issued warrant may be searched if it is reasonable to believe that the container could conceal items of the kind portrayed in the warrant." United States v. Gray, 814 F.2d 49, 51 (1st Cir. 1987)(citations omitted). However, "special concerns arise when the items to be searched belong to visitors, and not occupants, of the premises." United States v. Giwa, 831 F.2d 538, 544 (5th Cir. 1987)(citations omitted). In such situations, "a search of personal effects, such as briefcases, pocketbooks, portfolios, etc. 'does not clearly fall either within the realm of a personal search or a search of the premises.'" Premises Known & Described as 55 West 47th Street, Suites 620 & 650 v. United States, 712 F. Supp. 437, 442 n.8 (S.D.N.Y. 1989)(citation omitted). In analyzing whether a visitor's container may be searched pursuant to a premises search warrant, the circuit courts have taken two different approaches. One approach focuses on the relationship between the visitor and the premises being searched, while the other focuses on the physical possession or location of the item in question.

- 1) **Some Courts Look to the Relationship Between the Visitor and the Place Searched to Determine if the Container Falls Under the Authority of the Warrant.** Various courts have addressed the search of a visitor's container "by focusing primarily on the relationship between the person whose personal effects are searched and the place which is the subject of the search." Giwa, 831 F.2d at 544. See also United States v. Micheli, 487 F.2d 429, 431 (1st Cir. 1973)("In determining to what extent a recognizable personal effect not currently worn, but apparently temporarily put down, such as a briefcase, falls outside the scope of a warrant to search the premises, we would be better advised to examine the relationship between the person and the place"). Under this approach, the stronger the relationship between a visitor and the premises being searched, the more likely a search of the visitor's personal possessions would be permitted under the auspices of the warrant. See, e.g., Gray 814 F.2d at 51 (Search of defendant's jacket valid under the search warrant because "the defendant was not ... a casual afternoon visitor to the premises," but instead was "discovered in a private residence, outside of which a drug deal had just 'gone down,' at the unusual hour of 3:45 a.m."); Micheli, 487 F.2d at 432 (Search of defendant's briefcase valid under the search warrant where defendant was not simply "a mere visitor or passerby who suddenly found his belongings vulnerable to a search of the premises," but instead "had a special relationship to the place, which meant that it could reasonably be expected that some of his personal belongings would be there"); Giwa, 831 F.2d at 545 (Search of defendant's flight bag valid under the search warrant where defendant was not a "mere visitor" or "passerby," but instead was an "overnight visitor" to the apartment and appeared to be "more than just a temporary presence in the apartment"); Hummel-Jones v. Strobe, 25 F.3d 647, 651-52 (8th Cir. 1994)(In finding search of visitor's bag unlawful, court noted that "[p]resence, standing alone, is not enough of a relationship to justify searching a visitor's bag"); United States v. Branch, 545 F.2d 177, 182 (D.C. Cir. 1976)(Search of defendant's bag pursuant to search warrant found invalid where, *inter alia*, "he was apparently a mere visitor; his relationship to the premises was not known, but was at best the subject of speculation").

- 2) **Other Courts Look to the Physical Possession or Proximity of the Container to Decide Whether a Search is Permitted Pursuant to the Warrant.** Other courts analyze the search of a visitor's container by looking to whether the item is in the physical possession of the visitor at the time of the search. If the item is in the physical possession of the visitor, then the bag becomes an extension of the person and is clearly outside the scope of a premises search warrant. Alternatively, if the item is not in the physical possession of the visitor, then it falls outside the scope of a "personal" search and may be searched pursuant to the warrant. See Micheli, 487 F.2d at 431 ("A search of clothing currently worn is plainly within the ambit of a personal search and outside the scope of a warrant to search the premises"); Branch, 545 F.2d at 182 (Search of defendant's bag pursuant to search warrant found invalid where, *inter alia*, "the bag in dispute was suspended from his shoulder"). United States v. Teller, 397 F.2d 494, 497 (7th Cir.), cert. denied, 393 U.S. 937 (1968)(In upholding search of defendant's purse pursuant to search warrant, court held "it would be contrary to the facts to hold that a search of a purse lying upon a bed, where it was placed by its owner, constitutes a search of the person of that owner who had placed it there and left the room") (emphasis in original); United States v. Johnson, 475 F.2d 977, 979 (D.C. Cir. 1973)(Search of defendant's purse was valid under search warrant because "it was not being 'worn' by [the defendant] and thus did not constitute an extension of her person so as to make the search one of her person") (emphasis in original).
5. **Generally, There is No Requirement to Present the Warrant Prior to Beginning the Search.** "Law enforcement officers are not constitutionally required to present a copy of the search warrant prior to commencing a search, so long as the previously issued warrant is presented before the officers vacate the premises." United States v. Hepperle, 810 F.2d 836, 839 (8th Cir. 1987). See also Frisby v. United States, 79 F.3d 29, 32 (6th Cir. 1996)("The Fourth Amendment does not necessarily require that government agents serve a warrant, or an attachment thereto, prior to initiating a search or seizing property"); United States v. Bonner, 808 F.2d 864 (1st Cir. 1986), cert. denied, 481 U.S. 1006 (1987). However, the Ninth Circuit Court of Appeals has enunciated a different standard. See United States v. Gantt, 194 F.3d 987, 1003 (9th Cir. 1999) (holding "if Rule 41(d) does not 'invariably' require service before the search, then Rule 41(d) must usually require service before the search").

6. **A Law Enforcement Officer May Answer a Ringing Telephone During the Execution of a Search Warrant.** A law enforcement officer may answer a ringing telephone without violating the Fourth Amendment if he is lawfully on the premises executing a search warrant. As noted by one court: "An agent's conduct in answering a telephone while lawfully on the premises is not violative of the Fourth Amendment." United States v. Passarella, 788 F.2d 377, 380 (6th Cir. 1986). Accordingly, "where the officers were lawfully upon the premises and answered the telephone, any incriminating evidence acquired from those telephone calls is not subject to suppression on grounds of constitutionally protected privacy concerns." Id. at 382. See United States v. Vadino, 680 F.2d 1329 (11th Cir. 1982); United States v. Gallo, 659 F.2d 110 (9th Cir. 1981); United States v. Campagnuolo, 592 F.2d 852 (5th Cir. 1979); United States v. Fuller, 441 F.2d 755 (4th Cir.), cert. denied, 404 U.S. 830 (1971).
7. **A Law Enforcement Officer May Temporarily Seize Handguns Found During the Execution of a Search Warrant.** When, during the execution of a search warrant, a handgun is found that is not obviously contraband, the handgun may be temporarily seized for safety reasons. See, e.g., United States v. Bishop, 338 F.3d 623, 628 (6th Cir. 2003), cert. denied, 540 U.S. 1206, 124 S. Ct. 1479 (2004) ("We hold that a police officer who discovers a weapon in plain view may at least temporarily seize that weapon if a reasonable officer would believe, based on specific and articulable facts, that the weapon poses an immediate threat to officer or public safety"); United States v. Malachese, 597 F.2d 1232, 1234 (8th Cir. 1979), cert. denied, 444 U.S. 902 (1979) ("Although the incriminating nature of the handgun may not have been immediately apparent to the investigating officers, its temporary seizure, unloading, and retention by a responsible officer ... seem[ed] a reasonable precaution to assure the safety of all persons on the premises during the search"); United States v. Miles, 82 F. Supp. 2d 1201, 1209 (D. Kan. 1999), aff'd, 2001 U.S. App. LEXIS 16160 (10th Cir. 2001) ("Once inside the apartment, either pursuant to a consensual search or the valid execution of an arrest warrant, the officers were free to seize, at least momentarily for their safety and the safety of others in the area, the firearm which was in plain view"); United States v. Pillow, 842 F.2d 1001, 1004 (8th Cir. 1988) (Temporary seizure of weapon reasonable where "the gun was in plain view and subject to seizure as a reasonable safety precaution"); United States v. Timpani, 665 F.2d 1, 5 (1st Cir. 1981) (Removal of weapons to vehicle while search warrant was obtained was reasonable).
8. **A Suspect Ordinarily Has No Right to Have an Attorney Present During the Execution of a Search Warrant.** A suspect does not ordinarily have a right to have an attorney present during the execution of a search warrant. See United States v. Timpani, 665 F.2d 1, 3 (1st Cir. 1981). However, in certain circumstances, such as when the suspect is arrested or "judicial proceedings" have been initiated, a Fifth or Sixth Amendment right to counsel might accrue. Id. (citation omitted).

9. **A Law Enforcement Officer May Use a Reasonable Amount of Force When Executing a Search Warrant.** "Case law has indicated that at least in certain circumstances officers lawfully may handcuff the occupants of the premises while executing a search warrant." *Torres v. United States*, 200 F.3d 179, 185 (3d Cir. 1999). "On the other hand, handcuffing may be excessive in certain circumstances." *Id.* Whether the force used was reasonable is determined by looking at the "totality of the circumstances." Among the factors considered by the courts in making this determination are:
- a. The Severity of the Crime, *Graham*, 490 U.S. at 396;
 - b. Whether the Suspect Poses An Immediate Threat to the Safety of the Officers or Others, *Id.*;
 - c. Whether the Suspect is Actively Resisting Arrest or Attempting to Evade Arrest By Flight, *Id.*;
 - d. How Many Individuals the Officers Confronted, *Mellott v. Heemer*, 161 F.3d 117, 122 (3d Cir. 1998), cert. denied, 526 U.S. 1160 (1999);
 - e. Whether the Physical Force Applied Was of Such An Extent As to Lead to Injury, *Id.*;
 - f. Whether the Suspect Was Elderly, a Child, or Suffering From Illness or Medical Disability, *Franklin v. Foxworth*, 31 F.3d 873, 876 (9th Cir. 1994)("Detentions, particularly lengthy detentions, of the elderly, or of children, or of individuals suffering from a serious illness or disability raise additional concerns").
10. **Destruction of Property During a Search is Not Necessarily a Violation of the Fourth Amendment.** As a general rule, "any destruction of property that is not reasonably necessary to the performance of the law enforcement officer's duties constitutes an unreasonable seizure under the Fourth Amendment." *Destruction of Property as Violation of Fourth Amendment*, 98 A.L.R.5th 305 (2002). Suffice it to say, when law enforcement officers execute search warrants, they must occasionally damage property in order to conduct a complete and thorough search. Accordingly, "the destruction of property during a search does not necessarily violate the Fourth Amendment." *Id.* Instead, "only unnecessarily destructive behavior, beyond that necessary to execute a warrant effectively, violates the Fourth Amendment." *Liston v. County of Riverside*, 120 F.3d 965, 979 (9th Cir. 1997).
11. **Rule 41(f)(1)(B) Requires That Law Enforcement Officers Prepare an Inventory of Any Property Seized.** "An officer present during the execution of the warrant must prepare and verify an inventory of any property seized." *Rule 41(f)(2)*.

- a. **Inventory Must Be Prepared In the Presence of Another Officer or the Person Whose Property is Being Seized.** The officer who prepares the inventory “must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken.” Rule 41(f)(2).
 - b. **If Neither Present, Inventory Must Be Prepared in the Presence of One Other Credible Person.** If neither another officer or the person whose property is being seized “is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person.” Rule 41(f)(1)(B).
12. **Rule 41(f)(1)(C) Requires That Law Enforcement Officers Provide a Copy of the Warrant and the Receipt (Inventory).** Rule 41(f)(1)(C) provides, in pertinent part, that “the officer executing the warrant must:
- a. Give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken; or
 - b. Leave a copy of the warrant and receipt at the place where the officer took the property.”
13. **“Ministerial” Violations of Rule 41(f)(1)(C) Do Not Require Suppression of the Evidence.** “Courts have frequently held ... that not all violations of [Rule 41(f)(1)(C), formerly Rule 41(f)(3),] render a search invalid. ‘Ministerial’ violations of [the Rule]... require suppression of evidence only if the defendant can demonstrate that he was prejudiced by the violation.” United States v. Wyder, 674 F.2d 224, 226 (4th Cir.), cert. denied, 457 U.S. 1125 (1982). Examples of “ministerial” violations include a claim that the government had not returned the warrant to the magistrate judge within the prescribed time period, United States v. Smith, 914 F.2d 565, 568 (4th Cir. 1990), cert. denied, 498 U.S. 1101 (1991), and a “scrivenor’s” error contained in the copy of the search warrant provided to the defendant, Wyder, 674 F.2d at 225-226.

14. **Suppression is Required Where Actual Prejudice Occurs or There is Intentional Disregard of the Rule.** While “ministerial” violations of [Rule 41(f)(1)(C)] will not result in the suppression of evidence, this sanction is appropriate in circumstances where a constitutional violation has occurred. “[U]nless a clear constitutional violation occurs, noncompliance with Rule 41 requires suppression of evidence only where, (1) there was ‘prejudice’ in the sense that the search might not have occurred or would not have been so abrasive if the rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision in the Rule.” *United States v. Chaar*, 137 F.3d 359, 362 (6th Cir. 1998)(citation omitted). See also *Frisby*, 79 F.3d at 32 (“Although the procedural steps enumerated in [Rule 41(f)(1)(C)] are important and should not be disregarded, they are ministerial and ‘absent a showing of prejudice, irregularities in these procedures do not void an otherwise valid search’”(citation omitted); *Nichols*, 344 F.3d at 799 (“Where executing officers fail to abide by the dictates of Rule 41, suppression is only required if a defendant can demonstrate prejudice”).
15. **Rule 41(f)(1)(D) Also Requires the Warrant to be Returned to the Issuing Magistrate.** Following the issuance and execution of a search warrant, Rule 41(f)(1)(D) requires that “the officer executing the warrant must promptly return it - together with a copy of the inventory - to the magistrate judge designated on the warrant. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.” See also Rule 41(e)(2)(Providing the warrant must “designate the magistrate judge to whom it must be returned”). Rule 41(f)(3) states, however, that “[u]pon the government’s request, a magistrate judge – or if authorized by Rule 41(b), a judge of a state court of record – may delay any notice required by this rule if the delay is authorized by statute.” Examples of statutes that permit delayed notice are Rule 41(f)(2)(C) (warrants for electronic tracking devices), and 18 U.S.C. §3103a(b) (“sneak and peek “ or “covert entry” warrants).

P. EPO #16: IDENTIFY THE SCOPE AND PURPOSE OF A PROTECTIVE SWEEP

1. **General Rule – Protective Sweeps are Permitted Where a Law Enforcement Officer has Reasonable Suspicion to Believe the Residence Harbors a Third Party Who Could Pose a Danger to the Officer.** Prior to the Supreme Court’s decision in *Chimel v. California*, 395 U.S. 752 (1969), law enforcement officers were permitted to search the entire premises where an arrest occurred as an incident of that arrest. *Harris v. United States*, 331 U.S. 145 (1947). However, *Chimel* restricted the scope of a search incident to arrest in a dwelling to the arrestee’s person and the area “within his immediate control.” *Chimel*, 395 U.S. at 763. Two decades later, in *Maryland v. Buie*, 494 U.S. 325 (1990), the Supreme Court expanded the scope of a search incident to arrest in a dwelling and introduced what have become known as “protective sweeps.”

2. **"Protective Sweeps" Defined.** A "protective sweep" is a "quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." Buie, 494 U.S. at 327.
3. **Several Circuit Courts Do NOT Require An Arrest For a Protective Sweep To Be Valid.** Several federal courts have found that there is no "across-the-board, hard and fast *per se* rule that a protective sweep can be valid only if conducted incident to an arrest." United States v. Gould, 364 F.3d 578, 581 (5th Cir. 2004)(emphasis in original). These courts have recognized "in the in-home context it appears clear that even without an arrest other circumstances can give rise to equally reasonable suspicion of equally serious risk of danger of officers being ambushed by a hidden person as would be the case were there an arrest." Id. at 584. See, e.g., United States v. Taylor, 248 F.3d 506, 513 (6th Cir.), cert. denied, 534 U.S. 981 (2001)(Where government argued nothing in Buie decision indicated that an arrest is a mandatory prerequisite for conducting a protective sweep of the area, and that Buie was based on investigative stop cases, court found these arguments persuasive); United States v. Garcia, 997 F.2d 1273, 1282 (9th Cir. 1993)(Court upheld a protective sweep in a consent entry case where no arrest was made until after the sweep discovered guns in plain view); United States v. Patrick, 959 F.2d 991, 996-997 (D.C. Cir. 1992)(Where officers had consent to enter apartment, they "were lawfully on the premises" and thus "were authorized to conduct a protective sweep based on their reasonable belief that one of its inhabitants was trafficking in narcotics." According to the court: "We think the holding in Buie, notwithstanding the search there was conducted pursuant to a warrant and not consent, supports the police search here"); United States v. Koubriti, 199 F. Supp. 2d 656, 662 (D. Mich. 2002)("While the Court acknowledges that some circuits appear to take this restrictive view of the holding in Buie... the Sixth Circuit has expressly rejected such a narrow construction"). But see United States v. Davis, 290 F.3d 1239, n.4 1242 (10th Cir. 2002)(In finding protective sweep impermissible because there was no arrest, court quoted the first sentence of Buie; court also found sweep objectionable apparently because it was not narrowly confined to a cursory visual inspection of places where a person might be hiding, as required by Buie).
4. **There are Two Different Kinds of Protective Sweeps.** The Supreme Court has identified two types of protective sweeps. The first, which requires no articulable suspicion, involves looking in people-sized places immediately adjoining the place of arrest. The second, which requires articulable suspicion, allows a greater intrusion into the premises. Maryland v. Buie, 494 U.S. 325 (1990); see also United States v. Ford, 56 F.3d 265, 268-69 (D.C. Cir. 1995) (Noting the Supreme Court has "identified two situations in which protective sweeps are justified, and two types of protective sweeps," with the "first involv[ing] 'looking in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched,' and the second going 'beyond that'");
 - a. Three Requirements to Conduct an "Automatic" Protective Sweep.

- 1) **First, the Officer May Only Look in Places Immediately Adjoining the Place of Arrest.** In Maryland v. Buie, 494 U.S. 325 (1990), the Supreme Court held that once an arrestee is located and the arrest is made, "as a precautionary matter and without probable cause or reasonable suspicion, [officers may] look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched."
- 2) **Second, the Officer May Only Look in Places Where Persons Could Be Located.** It should be remembered that a "protective sweep" is not a full search of a dwelling. "Rather, such a search may only encompass those spaces where an individual might be found." United States v. Blue, 78 F.3d 56, 61 (2d Cir. 1996)(Search of mattress springs did not fall within the scope of protective sweep because "the nature and scope of the intrusion could not be justified by a reasonable, articulable suspicion that the mattress concealed a dangerous person"). See also Ford, 56 F.3d at 270 (Search under mattress and behind window shades outside the scope of a permissible protective sweep because persons could not reasonably hide under mattress or behind window shades); United States v. Lauter, 57 F.3d 212, 216-17 (2d Cir. 1995)(Officer "was justified in looking in the space between the bed and the wall, as a person certainly could have been hiding in that location"); United States v. Tucker, 1999 U.S. App. LEXIS 1480 (10th Cir. 1999) (unpublished) (During protective sweep, officers "are entitled to look in a closet or open a bathroom door or look behind a bulky piece of furniture").

- 3) **Third, the Protective Sweep May Last No Longer Than is Necessary to Dispel the Danger.** In Buie, the Court ruled that a protective sweep may “last no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.” Buie, 494 U.S. at 336. Although there is no bright-line rule on how long a protective sweep may last, it is important to remember that they are generally measured in terms of minutes, rather than hours. Thus, the longer it takes to complete a protective sweep, the more likely a court would find the sweep excessive. See, e.g., United States v. Richards, 937 F.2d 1287, 1292 (7th Cir. 1991)(In upholding protective sweep, court stated: “[The officer] did not search through drawers or dawdle in each room looking for clues. He moved briefly through two bedrooms, the bathroom and kitchen. When satisfied that the apartment was secure he returned to the living room and called for assistance. The Court in Buie requires no more”); United States v. Burrows, 48 F.3d 1011, 1017 (7th Cir.), cert. denied, 515 U.S. 1168 (1995)(Protective sweep upheld where “the search of ... four bedrooms and a linen closet, which required the officers to force four locked doors, took no more than five minutes, an interval compatible with the officers’ legitimate purpose”); United States v. Hromada, 49 F.3d 685, 690 (11th Cir. 1995) (Protective sweep upheld where “the SRT opened doors only to areas large enough to harbor a person. There is no evidence that the officers opened drawers or that the sweep of the house was overextensive. In fact, the sweep was short; it lasted only about a minute”); United States v. Smith, 131 F.3d 1392, 1396 (10th Cir. 1997), cert. denied, 522 U.S. 1141 (1998)(Protective sweep upheld where it was properly limited in scope and “its duration was between thirty and forty seconds, well within the time it took to arrest Mr. Snider and depart”). But see, e.g., Hogan, 38 F.3d at 1150 (Court found a two-hour protective sweep impermissible because it appeared to be “a fishing expedition for evidence” and because it “greatly exceeded the permissible scope of a protective sweep”); United States v. Noushfar, 140 F.3d 1244, 1245 (9th Cir. 1996)(Protective sweep “exceeded the limits of a Buie sweep in both time and scope” where Customs agents “went through the apartment for more than a half-hour”); United States v. Akrawi, 920 F.2d 418, 420-421 (6th Cir. 1990)(Protective sweep found impermissible because, *inter alia*, it lasted forty-five minutes).

- b. **Additional Requirement to Conduct an “Extended” Protective Sweep.** In order to conduct an extended protective sweep, an extra requirement must be satisfied.

- 1) **Reasonable Suspicion that Other Dangerous Persons are Present.** To search beyond the area immediately adjoining the place of arrest, a law enforcement officer must have reasonable suspicion "that the area to be swept harbors an individual posing a danger to those on the arrest scene." Buie, 494 U.S. at 334. "The officer's belief must be based on specific and articulable facts." United States v. Cunningham, 133 F.3d 1070, 1073 (8th Cir.), cert. denied, 523 U.S. 1131 (1998). *See, e.g., United States v. Paradis*, 351 F.3d 21, 29 (1st Cir. 2003) ("The government's protective sweep argument fails because the officers had no reason to believe that there might be an individual posing a danger to the officers or others"); United States v. Hogan, 38 F.3d 1148, 1150 (10th Cir. 1994), cert. denied, 514 U.S. 1008 (1995) (Protective sweep of murder suspect's home after his arrest was not justified when "there was no indication that the officers were in danger from a hidden accomplice"). In making a determination on where reasonable suspicion exists, a totality of the circumstances test is used. United States v. Burrows, 48 F.3d 1011, 1016 (7th Cir.), cert. denied, 515 U.S. 1168 (1995). Some factors that courts have found justify a protective sweep include:
- a) **Nervousness.** A suspect's nervousness may be one factor that can justify a protective sweep. *See, e.g., United States v. Cash*, 378 F.3d 745, 748 (8th Cir. 2004); Taylor, 248 F.3d at 514 (One factor justifying a protective sweep was the occupant's nervous demeanor).
 - b) **Furtiveness.** A suspect's furtiveness may also be a factor justifying a protective sweep. *See, e.g., Cash*, 378 F.3d at 748 ("Since an officer confronting a nervous and furtive suspect on the street has an articulable reason to be concerned for his safety and may therefore conduct a Terry stop and frisk, it follows that an officer arresting a nervous and furtive suspect in an unfamiliar residence has an articulable reason to be concerned for his safety and may therefore conduct a Buie sweep"); United States v. Meza-Corrales, 183 F.3d 1116, 1124 (9th Cir. 1999) (One factor justifying a protective sweep was the occupants' furtive actions).
 - c) **Noises Suggesting Additional Persons Are Present.** Where an officer hears noises indicating that additional persons are present at the residence, this factor may justify a protective sweep. *See, e.g., Taylor*, 248 F.3d at 514 (Protective sweep justified, in part, because officers "had heard noises suggesting that more than one person was present in the apartment").

- d) **Circumstantial Evidence Suggesting Criminal Associates Are Present.** In United States v. Stover, 474 F.3d 904 (6th Cir. 2007), the fact that police identified a car parked in the driveway of defendant's duplex registered to a local criminal who did not live at defendant's address was sufficient to justify a protective sweep.

5. **Evidence Observed in Plain View While Lawfully Performing a Protective Sweep is Admissible.** "The seizure of obviously incriminating evidence found during a protective sweep is constitutionally permissible pursuant to the plain view doctrine." United States v. Waldrop, 404 F.3d 365, 369 (5th Cir. 2005). See also United States v. Munoz, 150 F.3d 401, 411 (5th Cir. 1998), cert. denied, 525 U.S. 1112 (1999)("Since the arrest warrant places them in a lawful position to view the incriminating object - by authorizing their presence in the residence - and the search for the suspect in places where he might be hiding establishes their lawful right of access to it, they can seize it without a search warrant"); United States v. Weems, 322 F.3d 18, 22 (1st Cir.), cert. denied, 540 U.S. 892 (2003)(Upholding plain view seizure made during protective sweep).

6. **Based Upon Reasonable Suspicion, An Officer May Conduct a Protective Sweep Inside the Premises If the Arrest Occurs Outside.** There is no bright-line rule that prohibits law enforcement officers from performing protective sweeps of premises when an arrest occurs outside of that building. “Although ... Buie involved an in-home arrest, courts have recognized that the same exigent circumstances present in Buie can sometimes accompany an arrest just outside of a residence or other structure.” Cavely, 318 F.3d at 1002. “The fact that the arrest takes place outside rather than inside the home affects only the inquiry into whether the officers have a reasonable articulable suspicion that a protective sweep is necessary by reason of a safety threat.” United States v. Colbert, 76 F.3d 773, 776-777 (6th Cir. 1996). Thus, “depending on the circumstances, the exigencies of a situation may make it reasonable for officers to enter a home without a warrant in order to conduct a protective sweep.” Cavely, 318 F.3d at 1002. See, e.g., Colbert, 76 F.3d at 776-77 (Protective sweep for arrest just outside home may be justified); United States v. Lawlor, 406 F.3d 37, 41 (1st Cir. 2005) (Court “accept[ed] the position that a protective sweep may be conducted following an arrest that takes place just outside the home, if sufficient facts exist that would warrant a reasonably prudent officer to fear that the area in question could harbor an individual posing a threat to those at the scene”); United States v. Soria, 959 F.2d 855 (10th Cir.), cert. denied, 506 U.S. 882 (1992)(Police search of nearby auto body shop after arresting the owner was a valid protective sweep); United States v. Wilson, 306 F.3d 231, 238 (5th Cir. 2002) (Sweep reasonable where suspect arrested just outside entry); United States v. Henry, 48 F.3d 1282, 1284 (D.C. Cir. 1995)(Buie rationale applicable to arrest just outside home); United States v. Kimmons, 965 F.2d 1001 (11th Cir. 1992). As with an extended protective sweep, the officers must have reasonable suspicion to believe that the area to be swept harbors an individual who poses a danger to those at the arrest scene. As one court has noted: “If the exigencies to support a protective sweep exist, whether the arrest occurred inside or outside the residence does not affect the reasonableness of the officer’s conduct. A bullet fired at an arresting officer standing outside a window is as deadly as one that is projected from one room to another. The likelihood of the destruction of evidence is the same whether the arrest is indoors or in an outside area within the sight or hearing range of an accomplice within the residence.” United States v. Hoyos, 892 F.2d 1387, 1397 (9th Cir. 1989), cert. denied, 498 U.S. 825 (1990), *overruled on other grounds by* United States v. Ruiz, 257 F.3d 1030 (9th Cir. 2001). See also, United States v. Oguns, 921 F.2d 442, 446 (2d Cir. 1990) (Noting that protective sweep inside home is lawful even where arrest occurred outside “if the arresting officers had ‘(1) a reasonable belief that third persons [were] inside, and (2) a reasonable belief that the third persons (were) aware of the arrest outside the premises so that they might destroy evidence, escape or jeopardize the safety of the officers or the public’”); United States v. Arch, 7 F.3d 1300, 1303 (7th Cir. 1993), cert. denied, 510 U.S. 1139 (1994) (dicta) (“Even cases that countenance protective sweeps when an arrest is made just outside the home do so on the theory that the officers are as much at risk from an unexpected assault on the defendant’s doorstep as they might be inside the

home"); *United States v. Jackson*, 700 F.2d 181, 189 (5th Cir.), cert. denied, 464 U.S. 842 (1983) ("Arresting officers have a right to conduct a quick and cursory check of the arrestee's lodging immediately subsequent to arrest - even if the arrest is near the door but outside the lodging - where they have reasonable grounds to believe that there are other persons present inside who might present a security risk").

Q. EPO #17: IDENTIFY CIRCUMSTANCES IN WHICH PERSONS ON THE PREMISES MAY OR MAY NOT BE SEARCHED FOR EVIDENCE OR FRISKED DURING THE EXECUTION OF A PREMISES WARRANT

1. **General Rule - Occupants May Be Detained During the Execution of a Premises Search Warrant for Contraband.** "A warrant to search for contraband found on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Michigan v. Summers*, 452 U.S. 692, 705 (1981). See also *Muehler v. Mena*, 544 U.S. 93 (2005)(same). This is sometimes referred to as the "Summers' Doctrine." "Such detentions are appropriate ... because the character of the additional intrusion caused by detention is slight and because the justifications for detention are substantial." *Muehler*, 544 U.S. at 98 (citing *Summers*, 452 U.S. at 701-05).

NOTE: The rule outlined in *Summers* also applies when the search warrant is being executed on a business or corporation. See, e.g., *United States v. Wallace*, 323 F.3d 1109, 1111 (8th Cir. 2003)(Noting that, within a business context, "[t]he initial rounding up and temporary detention of employees" would be justified under *Summers*).

2. **There Are Three Justifications for the "Summers' Doctrine".** In *Summers*, *supra*, the Supreme Court noted three distinct justifications for this limited type of seizure.
 - a. **Prevention of Flight In Case Incriminating Evidence is Found.** First, there is a "legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found." *Summers*, 452 U.S. at 702.
 - b. **Minimizing Risk of Harm to the Officers Executing the Warrant.** Second, there is a societal interest "in minimizing the risk of harm to [the] officers" who are serving the search warrant. *Id.* This interest is served where "the officers routinely exercise unquestioned command of the situation." *Id.* at 703; see also *Los Angeles County v. Rettele*, 127 S. Ct. 1989 (2007) ("[W]hen officers execute a valid warrant and act in a reasonable manner to protect themselves from harm, the Fourth Amendment is not violated.")

- c. **Orderly Completion of the Search.** Finally, "the orderly completion of the search may be facilitated if the occupants of the premises are presented. Their self-interest may induce them to open locked doors or locked containers to avoid the use of force that is not only damaging to property but may also delay the completion of the task at hand." *Id.* at 703.
3. **All Three Justifications for Summers Need Not Be Met to Justify a Temporary Detention.** Of course, not all of these interests must be met to justify a temporary detention under *Summers*. See *Leveto v. Lapina*, 258 F.3d 156, 167 n.5 (3rd Cir. 2001) ("A detention may be reasonable even if fewer than all of [*Summers*] law enforcement interests are not present") (citation omitted); *United States v. Bohannon*, 225 F.3d 615, 617 (6th Cir. 2000) (Same). Further, an "officer's authority to detain incident to a search is categorical; it does not depend on the 'quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.'" *Muehler*, 544 U.S. 93, 98 (citation omitted).
4. **Reasonable Force May Be Used In Detaining a Suspect Under Summers.** "Inherent in *Summers*' authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention." *Muehler*, 544 U.S. at 98-99 (Upholding officers' use of handcuffs to detain occupant of home during execution of search warrant for weapons and gang membership); but see *Meredith v. Erath*, 342 F.3d 1057 (9th Cir. 2003) (absent justifiable circumstances, the detention of a person in handcuffs during the execution of a search warrant violates the Fourth Amendment. Using handcuffs to detain a subject who was loud and demanding, but who was not threatening, did not attempt to flee, and did not attempt to impede the officers' search for evidence of tax fraud was unreasonable). Further, "the risk of harm to officers and occupants is minimized 'if the officers routinely exercise unquestioned command of the situation.'" *Id.* (citing *Summers*, 452 U.S. at 703).

5. **The Length of a Detention Under *Summers*.** The Supreme Court commented in *Summers* that “possibly a prolonged detention ... might lead to a different conclusion in an unusual case” *Id.* at 705 n.21. However, the Supreme Court did not specify how long the detention at issue lasted in that case. Nonetheless, “[t]he opinion of the Michigan Court of Appeals in the same case ... suggests that the detention was not short: *Summers* was detained during the time it took a police officer ‘to search the whole house’ and find heroin under a bar in the basement.” *Daniel v. Taylor*, 808 F.2d 1401, 1405 (11th Cir. 1986). *Accord* *Leveto v. Lapina*, 258 F.3d 156, 173 (3rd Cir. 2001) (“While the [*Summers*] Court did not extend this rule to cases ... featuring prolonged detention, the Court also did not foreclose such extensions. ... Moreover, lower courts suggested that rather lengthy detentions would fall within *Summers*’ purview.”); *United States v. Rowe*, 694 F. Supp. 1420, 1424 (N.D. Cal. 1988) (“Although the *Summers* Court did not define the duration of permissible detention, it apparently contemplated that occupants could be detained long enough for police to complete extensive searches.”). Further, “[s]ince the dissenters in *Summers* expressly raised the point, the *Summers* majority apparently appreciated that the concept of detention during searches of premises entails the prospect of detentions lasting several hours.” *Daniel*, 808 F.2d at 1405. *See also* *Maryland v. Buie*, 494 U.S. 325, 334 (1990) (“*Summers* held that a search warrant for a house carries with it the authority to detain its occupants *until the search is completed*.”) (emphasis added). Unfortunately, “the law is ambiguous as to when detention in conjunction with a lawful, premises search becomes impermissible,” *Daniel*, 808 F.2d at 1405. However, in at least one recent case, the Supreme Court upheld a detention of 2-3 hours. *See* *Muehler*, 544 U.S. at 100 (detention upheld where “case involved the detention of four detainees by two officers during a search of a gang house for dangerous weapon”). *See also* *Leveto*, 258 F.3d at 172-74 (eight-hour detention during execution of search warrant of veterinarian for evidence relating to tax offenses found unreasonable, but officers entitled to qualified immunity because “breadth of the *Summers*’ rule was highly uncertain”); *Daniel*, 808 F.2d 1403-05 (finding defendant agents entitled to qualified immunity where law was uncertain as to permissible length of detention, in this case, two hours and forty-five minutes).
6. **Application of the “*Summers*’ Doctrine” to Warrants to Search for “Evidence.”** In *Summers*, the search warrant at issue was for contraband (narcotics). Whether the rule introduced in *Summers* applies to search warrants to look for mere evidence of a crime is uncertain. The Supreme Court explicitly declined to address this issue, noting, “We do not decide whether the same result would be justified if the search warrant merely authorized a search for evidence.” *Id.* at 705 n.20. Additionally, the circuit courts of appeal have reached inconsistent results on this issue.

- a. Some Courts Distinguish Between "Contraband" and "Mere Evidence" For Purposes of Summers. Further, the circuit courts of appeal have reached inconsistent results on this issue. Some courts have found the distinction between "contraband" and "evidence" to be significant. As noted by one court:

"A primary law enforcement interest served by such detention is the prevention of flight in the event that incriminating evidence is found during the search. In this connection, the distinction between searches for contraband and searches for evidence is material. It is not uncommon for a search for contraband to produce items that justify an immediate arrest of the owner or resident of these premises, and a person who anticipates that a search may imminently result in his or her arrest has a strong incentive to flee. By contrast, a search for evidence – particularly complicated documentary evidence – is much less likely to uncover items that lead to an immediate arrest. Thus, even if the search is successful the suspect may well remain at liberty for some time until the evidence is examined and an indictment is obtained. As a result, the incentive to flee is greatly diminished."

Leveto, 258 F.3d at 168. See also Daniel, 808 F.2d at 1404 (Holding that Summers Doctrine "is not applicable to a search for evidence, because the existence of mere evidence, as opposed to contraband, on the premises does not suggest that a crime is being committed on the premises").

- b. Some Courts Have NOT Distinguished Between "Contraband" and "Mere Evidence" For Purposes of Summers. Alternatively, some courts have not distinguished for purposes of Summers between search warrants for contraband and those for evidence. See, e.g., Rowe, 694 F. Supp. at 1424-25 (Court applied the Summers' Doctrine to a search for evidence).

7. **To Detain a Suspect Under Summers, the Suspect's Proximity to the Residence Being Searched is a Factor.** "The proximity between an occupant of a residence and the residence itself may be relevant in deciding whether to apply Summers, but it is by no means controlling." United States v. Cavazos, 288 F.3d 706, 712 (5th Cir. 2002). See also United States v. Cochran, 939 F.2d 337, 339 (6th Cir. 1991), cert. denied, 502 U.S. 1093 (1992) ("Summers does not impose upon police a duty based on geographic proximity"); United States v. Vite-Espinoza, 342 F.3d 462, 468 (6th Cir. 2003) (Detention of individuals found in "backyard of a drug and counterfeit document distribution facility" legally detained under Summers).

- a. The Farther a Suspect is From the Residence, the Less Likely **Summers** Will Apply. Nonetheless, the farther a suspect is from the residence to be searched, the less likely the detention would be upheld under Summers. See, e.g., United States v. Sherrill, 27 F.3d 344, 346 (8th Cir.), cert. denied, 513 U.S. 1048 (1994) (Refusing to extend Summers to stop of defendant's vehicle one block from home); United States v. Edwards, 103 F.3d 90, 93-94 (10th Cir. 1996) (Refusing to apply Summers to a defendant who was seized three blocks away from the search).
 - b. **Summers** Has Been Applied to the Detention of Persons Who Approach a Residence During the Execution of a Search Warrant. Where an individual approaches and attempts to enter a residence where a search warrant is being executed, Summers may provide a justification for detaining that person. See, e.g., Bohannon, 225 F.3d at 617 (Search and seizure of two men who attempted to enter residence during execution of a drug warrant justified under Summers, because of need to protect officers' safety); Baker v. Monroe Township, 50 F.3d 1186, 1192 (3d Cir. 1995) ("Although Summers itself only pertains to a resident of the house under warrant, it follows that the police may stop people coming to or going from the house if police need to ascertain whether they live there"); Burchett v. Kiefer, 310 F.3d 937, 944 (6th Cir. 2002)(Holding that, "officers act within their Summers powers when they detain an individual who approaches a property being searched pursuant to a warrant, pauses at the property line, and flees when the officers instruct him to get down. Although this reaches beyond Summers 'occupants' language, it is consistent with the policies that Summers identified"); United States v. Patterson, 885 F.2d 483, 485 (8th Cir. 1989)("The possible danger presented by an individual approaching and entering a structure housing a drug operation is obvious. In fact, it would have been foolhardy for an objectively reasonable officer not to conduct a security frisk under the circumstances").
8. **A Search Warrant Does Not Permit a Frisk of All Persons Present During Its Execution.** "The 'narrow scope' of the Terry exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place." Ybarra v. Illinois, 444 U.S. 85 (1979). Instead, "[a] non-protective search must normally be supported by probable cause and, with certain exceptions, must be authorized by a warrant." Doe v. Groody, 361 F.3d 232, 238 (3rd Cir. 2004). See also Leveto, 258 F.3d at 164 ("The Supreme Court has also held that possession of a warrant to search particular premises is not alone sufficient to justify a pat down of a person found on the premises at the time of execution"). As noted by the Court: "A person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." Ybarra, 444 U.S. at 91.

9. **A Search Warrant Does Not Permit a Search of All Persons Present During Its Execution.** “A search warrant for a premises does not constitute a license to search everyone inside.” Groody, 361 F.3d at 243. Instead, “[b]eyond [the] general authority to detain persons and make limited security searches ... there must be probable cause, or at least some degree of particularized suspicion, to justify further searches or seizures of individuals who are neither named in the warrant nor arrested as a consequence of the search.” Rivera v. United States, 928 F.2d 592, 606 (2d Cir. 1991). Of course, “[i]f a warrant ... authorize[s] a search of [a person], then the officers [are] entitled to rely upon it to satisfy the probable cause requirement” Groody, 361 F.3d at 243. See Ybarra, 444 U.S. at 91 (“Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be”); United States v. Di Re, 332 U.S. 581, 587 (1948) (“We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled”); Khounsavanh, 113 F.3d at 287 (Holding that “probable cause to believe ... the premises contain contraband or evidence of a crime ... [does] not alone provide a sufficient basis for the police to ... search [a] defendant's person”).

R. EPO #18: IDENTIFY THE CIRCUMSTANCES IN WHICH EVIDENCE MAY BE SEIZED UNDER THE PLAIN VIEW DOCTRINE

1. **General Rule – Law Enforcement Officers May Seize Evidence in “Plain View” Without a Warrant.** “As a general rule, only items that are described in a search warrant may be seized in accordance with Fourth Amendment concerns.” United States v. Waldrop, 404 F.3d at 368. “An exception to this general rule, however, is found where a police officer has a warrant to search a given area for specified objects and in the course of the search comes across some other article of incriminatory character. The property is then seizable under the plain view doctrine.” United States v. Bills, 555 F.2d 1250, 1251 (5th Cir. 1977). As noted by the Supreme Court: “It is well established that under certain circumstances the police may seize evidence in plain view without a warrant.” Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971). “An example of the applicability of the ‘plain view’ doctrine is the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character.” Horton v. California, 496 U.S. 128, 135 (1990).

2. **There are Three Requirements for a “Plain View” Seizure of Evidence.** In Horton, *supra*, the Supreme Court outlined the three requirements that must be met for a permissible “plain view” seizure of evidence. First, a law enforcement officer must lawfully be in a position to observe the item; second, the incriminating nature of the item must be immediately apparent; and third, the officer must have a lawful right of access to the object itself. *Id.* at 135-137. See also Boone v. Spurgess, 385 F.3d 923, 928 (6th Cir. 2004) (“The plainview exception permits a warrantless seizure where ‘(1) the officer is lawfully positioned in a place from which the object can be plainly viewed; (2) the incriminating character of the object is immediately apparent; and (3) the officer has a lawful right of access to the object itself’”(citation omitted)).

NOTE: At least one federal court has recognized a “plain hearing” corollary to the plain view doctrine. See Ceballos, 385 F.3d at 1124 (“We have recognized that the plain view doctrine applie[s] in the context of overheard speech, creating a ‘plain hearing’ doctrine”)[*citing United States v. Ramirez*, 112 F.3d 894, 851 (7th Cir.), *cert. denied*, 522 U.S. 892 (1997)]. The requirements for both “plain view” and “plain smell” are synonymous.

- a. **First, the Law Enforcement Officer Must Have Been in a Lawful Position to Observe the Item.** First, “it is ... an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed.” Horton, 496 U.S. at 136. In essence, this simply means that a law enforcement officer must have a lawful reason for being in the location where he observed the item.

- 1) **An Officer May Be Lawfully Present Based On the Execution of a Search or Arrest Warrant.** For example, where a law enforcement officer who makes his observations while serving a valid search or arrest warrant, he is lawfully present for purposes of the plain view doctrine. See, e.g., United States v. Hamie, 165 F.3d 80, 82 (1st Cir. 1999)(Officers were lawfully on premises for plain view observation because they “had a valid warrant to search the premises”); United States v. Calloway, 116 F.3d 1129, 1133 (6th Cir.), cert. denied, 522 U.S. 925 (1997) (Plain view seizure permissible where officers were present because they “were executing a valid search warrant”); United States v. Reinholz, 245 F.3d 765, 777 (8th Cir.), cert. denied, 534 U.S. 896 (2001) (Officers executing a search warrant were lawfully on premises, so seizure of drug paraphernalia from vehicle in driveway was lawful under plain view doctrine where it was “immediately apparent through the car’s windows”); Munoz, 150 F.3d at 411 (Please view seizure permissible during execution of arrest warrant and protective sweep).
 - 2) **An Officer May Be Lawfully Present Based On An Exception to the Warrant Requirement.** The lawful presence element of the plain view doctrine has also been met where an exception to the warrant requirement has been found to exist. See, e.g., United States v. Reed, 141 F.3d 644, 649 (6th Cir. 1998)(quoting Horton, 496 U.S. at 135)(“Where the initial intrusion that brings the police within plain view of ... an [incriminating] article is supported, not by a warrant, but by one of the recognized exceptions to the warrant requirement, the seizure is also legitimate”); United States v. Jackson, 131 F.3d 1105, 1109 (4th Cir. 1997), cert. denied, 528 U.S. 945 (1999)(Where the officer’s observations occurred after he received consent to enter the basement, the court noted, “an officer’s presence in a residence is justified by a warrant or by any recognized exception to the warrant requirement, including consent, he may seize incriminating evidence that is in his plain view”).
- b. **Second, the Incriminating Nature of the Item Must Be “Immediately Apparent.”** Second, “not only must the item be in plain view, its incriminating character must also be ‘immediately apparent.’” Horton, 496 U.S. at 136 (citations omitted). See also United States v. Bruce, 109 F.3d 323, 328 (7th Cir.), cert. denied, 522 U.S. 838 (1997)(Noting “an officer only needs probable cause to believe that the item is linked to criminal activity in order for the plain view exception to the warrant requirement to apply”).

- 1) **"Immediately Apparent" Means a Law Enforcement Officer Must Have Probable Cause.** This means a law enforcement officer must have probable cause that the object in plain view is subject to seizure, such as contraband. *Arizona v. Hicks*, 480 U.S. 321, 326 (1987)("We have not ruled on the question whether probable cause is required in order to invoke the 'plain view' doctrine. ... We now hold that probable cause is required"). See *also Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993)("If ... the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object - i.e., if 'its incriminating character is not immediately apparent' - the plain-view doctrine cannot justify its seizure"); *Texas v. Brown*, 460 U.S. 730, 742 (1983)(In discussing requirement that incriminating nature be "immediately apparent," Court noted the standard is not high, and that a plain view seizure is "presumptively reasonable, assuming there is probable cause to associate the property with criminal activity"); *United States v. Wells*, 98 F.3d 808, 810 (4th Cir. 1996)(Where weapon was found in defendant's apartment during service of a search warrant, and defendant was known to be a convicted felon, incriminating nature of weapon was immediately apparent because the agents "had probable cause to believe the weapon was evidence of a crime at the time of the seizure").
- 2) **Courts Use Various Factors to Determine Whether the Incriminating Nature is "Immediately Apparent".** In determining whether an item's incriminating nature is immediately apparent, courts will examine various factors, such as "(1) the nexus between the seized object and the items particularized in the warrant; (2) whether the intrinsic nature or appearance of the seized object gives probable cause to associate it with criminal activity; and (3) whether probable cause is the direct result of the executing officer's instantaneous sensory perceptions." *United States v. Calloway*, 116 F.3d 1129, 1133 (6th Cir.), *cert. denied*, 522 U.S. 925 (1997). See *also United States v. Carter*, 378 F.3d 584, 589-90 (6th Cir. 2004)(Plain view exception applied to seizure of marijuana cigarette where the "smell and appearance" of the cigarette, combined with fact the suspect had admitted smoking marijuana a short time before, established probable cause "to consider it incriminating on its face"). As noted by the Supreme Court: "Regardless of whether the officer detects the contraband by sight or by touch ... the Fourth Amendment's requirement that the officer have probable cause to believe that the item is contraband before seizing it ensures against excessively speculative seizures." *Dickerson*, 508 U.S. at 376 (footnote omitted).

- c. **Third, the Law Enforcement Officer Must Have a Lawful Right of Access to the Evidence.** Finally, “not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself.” Horton, 496 U.S. at 137. “The difference between ‘lawfully positioned’ and ‘lawful right of access’ is thus that the former refers to where the officer stands when she sees the item, and the latter to where she must be to retrieve the item.” Boone, 385 F.3d at 928. As noted by the Supreme Court: “Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure.” Horton, 496 U.S. at 137 n.7 (citations omitted).

S. EPO #19: IDENTIFY FACT SITUATIONS WHERE WARRANTLESS SEARCHES ARE ALLOWED REGARDING MOTOR VEHICLES

1. **General Rule – Where Officers Have Probable Cause That a Readily Mobile Vehicle has Evidence or Contraband, a Warrantless Search May Be Conducted.** “It is well-settled that a valid search of a vehicle moving on a public highway may be had without a warrant, if probable cause for the search exists, i.e., facts sufficient to warrant a man of reasonable caution in the belief that an offense is being committed.” Fernandez v. United States, 321 F.2d 283, 286-287 (9th Cir. 1963)(citations omitted). See also United States v. Patterson, 140 F.3d 767, 773 (8th Cir), cert. denied, 525 U.S. 907 (1998)(A warrantless search of a vehicle is permissible where law enforcement officers have “probable cause to believe that contraband or evidence of criminal activity [will] be found”). This exception was first established by the Supreme Court in the 1925 case of Carroll v. United States, 267 U.S. 132 (1925), and provides that, if a law enforcement officer has probable cause to believe that a vehicle has evidence of a crime or contraband located in it, a search of the vehicle may be conducted without first obtaining a warrant.
2. **There are Two Distinct Justifications for the Vehicle Exception.** There are two (2) separate and distinct rationales underlying this exception. See, e.g., United States v. Pinela-Hernandez, 262 F.3d 974, 978 (9th Cir. 2001), cert. denied, 535 U.S. 1120 (2002)(“The reasons for this exception are two-fold: the expectation of privacy in one’s vehicle is less than in one’s home, and the mobility of vehicles necessitates faster action on the part of law enforcement officials”).

- a. **The Inherent Mobility of a Vehicle Makes Obtaining a Warrant Impracticable.** First, the inherent mobility of vehicles typically makes it impracticable to require a warrant to search, in that “the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.” Carroll, 267 U.S. at 153. See also United States v. Washburn, 383 F.3d 638, 641 (7th Cir. 2004)(“The original premise for the automobile exception was that a vehicle’s ‘ready mobility’ made an ‘immediate intrusion’ necessary to prevent the destruction of evidence”). As the Supreme Court has consistently observed, the inherent mobility of vehicles “creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible.” South Dakota v. Opperman, 428 U.S. 364, 367 (1976). For this reason, “searches of cars that are constantly movable may make the search of a car without a warrant a reasonable one although the result might be the opposite in a search of a home, a store, or other fixed piece of property.” Cooper v. California, 386 U.S. 58, 59 (1967) (citation omitted).
- b. **Individuals Have a Reduced Expectation of Privacy in Vehicles Based on Pervasive Government Regulation.** While the original focus of the mobile conveyance exception was a vehicle’s inherent mobility, recent cases have focused on an individual’s reduced expectation of privacy in a vehicle to support allowing a warrantless search based on probable cause. See, e.g., Pennsylvania v. LaBron, 518 U.S. 938 (1996); California v. Carney, 471 U.S. 386 (1985); Washburn, 383 F.3d at 641 (“In Carney, however, the Supreme Court clarified that a second reason justified the exception even where an automobile is ‘not immediately mobile’ - the lesser expectation of privacy in a vehicle”). As stated by the Supreme Court: “Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspections stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order.” Opperman, 428 U.S. at 368.
3. **There are Two Requirements for a Valid Search Under the Vehicle Exception.** There are two (2) requirements for a valid search under the mobile conveyance exception. See, e.g., United States v. Watts, 329 F.3d 1282, 1286 (11th Cir. 2003)(Noting “there are only two questions that must be answered in the affirmative before authorities may conduct a warrantless search of an automobile. The first is whether the automobile is readily mobile. ... The second prong of the test, probable cause, is determined under the facts of each case”).

- a. **There Must Be Probable Cause to Believe Contraband or Evidence of a Crime is Located in the Vehicle.** First, there must be probable cause to believe that evidence of a crime or contraband is located in the vehicle to be searched. "Articulating precisely what ... 'probable cause' mean[s] is not possible." Ornelas v. United States, 517 U.S. 690, 695 (1996). Suffice it to say, probable cause cannot be "readily, or even usefully, reduced to a neat set of legal rules." Id. at 695-696. Instead, the Supreme Court has found probable cause to exist "where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." Id. at 696. See also United States v. Brown, 345 F.3d 574 (8th Cir. 2003)(Noting an "officer has probable cause to search a vehicle 'when, given the totality of the circumstances, a reasonable person could believe there is a fair probability that contraband or evidence of a crime would be found in a particular place'")(citation omitted).
- 1) **Only the Requirement for a Warrant is Excused.** In essence, this simply means that before conducting a warrantless search of a vehicle, a law enforcement officer should have sufficient facts available to him so that if he attempted to obtain a warrant from a magistrate judge, he would be successful. As noted by the Supreme Court in United States v. Ross, 456 U.S. 798, 823 (1982): "[O]nly the prior approval of the magistrate is waived; the search otherwise [must be such] as the magistrate could authorize." Thus, a search of a vehicle based upon probable cause "is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant had not actually been obtained." Id. at 809. In determining whether probable cause exists, courts utilize a "totality of the circumstances" test. Illinois v. Gates, 416 U.S. 213, 230-231 (1983).
- 2) **Probable Cause to Search a Vehicle May Be Established in a Variety of Different Ways.** Establishing probable cause to search a vehicle may be accomplished in a variety of ways.

- a) **A Tip Provided By a Confidential Informant May Establish Probable Cause for a Vehicle Search.** For example, a law enforcement officer may be able to establish probable cause based on a tip provided to him by a reliable confidential informant. Maryland v. Dyson, 527 U.S. 465 (1999). See also United States v. Rodriguez, 367 F.3d 1019, 1026 (8th Cir. 2004)(Probable cause established where informant scheduled buy and defendant arrived as scheduled; informant identified defendant; and defendant exchanged "code" word with informant); United States v. Lumpkin, 159 F.3d 983, 986 (6th Cir. 1998)(Noting that "probable cause may come from a confidential informant's tip, when sufficiently detailed and corroborated by the independent investigation of law enforcement officers").
- b) **A Law Enforcement Officer's Plain View Observations May Establish Probable Cause for a Vehicle Search.** Additionally, when a law enforcement officer personally observes evidence or contraband in plain view inside a vehicle, probable cause can arise. See, e.g., United States v. Van Zee, 380 F.3d 342, 343-44 (8th Cir. 2004)(Finding law enforcement officers had probable cause to search a truck where one officer "saw the end of a glass tube in plain view on the truck console" and "reasonably believed it was part of a glass 'crank' pipe based on his experience as a narcotics investigator and what the agents had been told about [the defendant's] drug activities"); United States v. Fladten, 230 F.3d 1083, 1086 (8th Cir. 2000)(Where "an item commonly used in the manufacture of methamphetamine was in plain view in the back seat of the automobile," probable cause existed for search of vehicle); United States v. McGuire, 957 F.2d 310, 314 (7th Cir. 1992) (Discovery of open container of alcohol in car in violation of state law gave police probable cause to conduct warrantless search of car).

- c) **A Law Enforcement Officer's May Establish Probable Cause Using "Plain Smell."** Additionally, the "plain smell" corollary to the plain view doctrine may allow a law enforcement officer to establish probable cause to search a vehicle based upon his or her sense of smell. *See, e.g., United States v. Foster*, 376 F.3d 577, 588 (6th Cir. 2004) ("Accordingly, when the officers detected the smell of marijuana coming from Foster's vehicle, this provided them with probable cause to search the vehicle without a search warrant"); *United States v. Miller*, 812 F.2d 1206, 1208-1209 (9th Cir. 1987)(Probable cause established where "the police officers who arrived at the Elm Street address detected a strong smell of phylacetic acid, known to be used in the manufacture of methamphetamine, emanating from Miller's car. In addition, the officers observed a handgun in plain view on the front floor and laboratory equipment commonly used in the manufacture of methamphetamine on the backseat of Miller's car. These plain view, plain smell observations ... gave the officers sufficient independent probable cause to search Miller's car without a warrant"); *United States v. Harris*, 958 F.2d 1304 (5th Cir.), *cert. denied*, 506 U.S. 898 (1992)(plain smell); *United States v. Anderson*, 468 F.2d 1280 (10th Cir. 1972)(plain smell); *United States v. Taylor*, 162 F.3d 12, 21 (1st Cir. 1998)(Officers had probable cause to search car for narcotics based upon "'strong odor' of marijuana").

- b. **The Vehicle Must Be “Readily Mobile” to Search It Under the Vehicle Exception.** The second requirement for a valid search under the mobile conveyance exception is that the vehicle be “readily mobile.” “All that is necessary to satisfy this element is that the automobile is operational.” United States v. Watts, 329 F.3d 1282, 1286 (11th Cir. 2003). Thus, “for a vehicle to fall within the automobile exception, it is not necessary that it be occupied or moving at the time of the police officer’s intrusion into the vehicle.” United States v. Wesley, 918 F. Supp. 81, 85 (W.D.N.Y. 1996). Stated differently, “readily mobile” does not mean that the vehicle be moving at the time it is encountered, only that the vehicle be capable of ready movement. Illustrative on this point is California v. Carney, 471 U.S. 386 (1985). In Carney, the Court noted that, “when a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes – temporary or otherwise – the two justifications for the vehicle exception come into play. First, the vehicle is obviously readily mobile by the turn of an ignition key, if not actually moving. Second, there is a reduced expectation of privacy stemming from its use as a licensed motor vehicle subject to a range of police regulation inapplicable to a fixed dwelling. At least in these circumstances, the overriding societal interests in effective law enforcement justify an immediate search before the vehicle and its occupants become unavailable.” Id. at 392-393. While the Supreme Court did not discuss the applicability of the mobile conveyance exception to a motor home that is “situated in a way or place that objectively indicates that it is being used as a residence,” Id. at 394 n.3, they did address “several factors which bear on whether or not a vehicle comes within the automobile exception for Fourth Amendment purposes.” United States v. Hatley, 15 F.3d 856, 859 (9th Cir. 1994) (quotation omitted). Among the factors deemed relevant to this decision are:

- 1) The Location of the Vehicle;
- 2) Whether the Vehicle was Readily Mobile or Elevated on Blocks;
- 3) Whether the Vehicle was Licensed;
- 4) Whether the Vehicle was Connected to Utilities;
- 5) Whether it had Convenient Access to a Public Road.

Carney, 471 U.S. at 394 n.3. See *also* Hatley, 15 F.3d at 859; United States v. Brookins, 345 F.3d 231, 238 (4th Cir. 2003)(Holding vehicle exception applied where “motor vehicle at issue was clearly operational and therefore ‘readily movable’”).

4. **No Exigency is Required to Conduct a Search Under the Vehicle Exception.** There is no “exigency” required to conduct a warrantless vehicle search; all that is required is a mobile conveyance and probable cause. Thus, even if a law enforcement officer had the opportunity to obtain a warrant and failed to do so, the search will still be valid if the two requirements discussed above were present. See Maryland v. Dyson, 527 U.S. 465, 466 (1999) (Court relied upon previous decision in holding that “the automobile exception does not have a separate exigency requirement: ‘If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment ... permits the police to search the vehicle without more’”); .
5. **A Search Under the Vehicle Exception May Be Conducted Immediately at the Scene or at a Later Time After the Vehicle Has Been Impounded.** Once a law enforcement officer has probable cause to search a readily mobile vehicle, the search may be conducted immediately or later at the police station. “There is no requirement that the warrantless search of a vehicle occur contemporaneously with its lawful seizure.” United States v. Johns, 469 U.S. 478, 484 (1985)(citations omitted). In Johns, the Supreme Court upheld the warrantless search of three packages that had been seized from a vehicle three days earlier, noting, “the justification to conduct such a warrantless search does not vanish once the car has been immobilized.” Id. See also Michigan v. Thomas, 458 U.S. 259, 261 (1982)(per curiam)(“The justification to conduct such a warrantless search does not vanish once the car has been immobilized; nor does it depend upon a reviewing court’s assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant”); Chambers v. Maroney, 399 U.S. 42, 52 (1975)(Noting “there is little to choose in terms of practical consequences between an immediate search without a warrant and the car’s immobilization until a warrant is obtained”); Texas v. White, 423 U.S. 67, 68 (1975)(per curiam)(Noting “police officers with probable cause to search an automobile on the scene where it was stopped could constitutionally do so later at the station house without first obtaining a warrant”); United States v. Rodriguez, 367 F.3d 1019, 1027 (8th Cir. 2004)(Where probable cause exists to search a vehicle, search “may take place at a separate place and time”)[citing United States v. Winters, 221 F.3d 1039, 1041 (8th Cir. 2000)].

NOTE: Notwithstanding the above, law enforcement officers must act “reasonably” and may not “indefinitely retain possession of a vehicle and its contents before they complete a vehicle search.” Johns, 469 U.S. at 487. Further, where time permits, a search warrant for the vehicle should be obtained, even in situations where a warrantless search may be permissible.

6. **The Vehicle Exception May Apply Even Where the Vehicle is Parked on Private Property.** “[T]he Supreme Court has never held that a vehicle’s location on private property forecloses application of the [vehicle] exception under all circumstances.” United States v. Shepherd, 714 F.2d 316, 319 (4th Cir. 1983), cert. denied, 466 U.S. 938 (1984). *See also* Brookins, 345 F.3d at 237 n.8 (Declining defendant’s invitation to adopt a “bright-line rule, whereby the automobile exception may never apply when a vehicle is stationed on private, residential property”); Hatley, 15 F.3d at 858-59 (“Though we have never addressed the precise issue of whether the vehicle exception applies to an inoperable vehicle, we have explicitly held that the vehicle exception applies to a search of a vehicle parked on a private driveway”)[*citing* United States v. Hamilton, 792 F.2d 837, 843 (9th Cir. 1986)]; United States v. Markham, 844 F.2d 366, 368 (6th Cir.), cert. denied, 488 U.S. 843 (1988)(“Although this case presents a variation on Carney because the vehicle searched was parked in a private driveway, the Court finds that the Carney rationale is controlling”).
7. **The Scope of a Search Under the Vehicle Exception**
- a. **General Rule – A Search Under the Vehicle Exception Will Extend to Every Place in the Vehicle Where the Object of the Search Could Be Located.** The Supreme Court in United States v. Ross, 456 U.S. 798 (1982), laid out the scope of a search conducted pursuant to the mobile conveyance exception. There, the Court stated: “We hold that the scope of the warrantless search authorized by [the mobile conveyance] exception is no broader and no narrower than a magistrate could legitimately authorize by warrant. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of ***every part of the vehicle and its contents that may conceal the object of the search.***” Id. at 825 (emphasis added).
- 1) **Law Enforcement Officers May Only Search Those Areas of the Vehicle Where the Object of the Search Could Be Located.** It should be remembered, however, that probable cause to search does not automatically entitle a law enforcement officer to search every part of a vehicle. *See, e.g., Ross*, 456 U.S. at 824 (“The scope of a warrantless search of an automobile ... is defined by the object of the search and the places in which there is probable cause to believe that it may be found”). For example, where there is probable cause to believe that a vehicle contains drugs, a search of the glove compartment would be permissible. Alternatively, if there is probable cause that the vehicle contains a large stolen television, a search of the glove compartment would be impermissible, in that the television could not be concealed in that location. Any mobile conveyance search is necessarily limited by what it is the officers are seeking in their search. In sum, if a search warrant could authorize the officers to search in a particular location, such as the passenger compartment or trunk of the vehicle, the officers may search there without a warrant.

- 2) **Particularized Probable Cause is Generally Not Required Before Searching a Trunk.** A question that often arises concerns whether a law enforcement officer must have “particularized” suspicion that evidence (e.g., drugs) are located in the trunk before a search of that area could ensure. Some examples are provided below.
- a) **Drugs.** If drugs (or drug paraphernalia) are found in the passenger compartment of a vehicle, this will typically allow for a search of the trunk for additional drugs. This is true even in situations where the drugs found in the passenger compartment amounted to what would be considered “personal use” amounts. See United States v. Turner, 119 F.3d 18, 20 (D.C. Cir. 1997); United States v. Loucks, 806 F.2d 208, 210-11 (10th Cir. 1986); United States v. Burnett, 791 F.2d 64, 67 (6th Cir. 1986); United States v. Hough, 944 F. Supp. 20, 23 & n.2 (D.D.C. 1996); United States v. Fladten, 230 F.3d 1083, 1086 (8th Cir. 2000) (Holding that drug paraphernalia on the backseat of a car parked near a house where drug-related activity took place provided probable cause for a trunk search); United States v. Parker, 72 F.3d 1444, 1450 (10th Cir. 1995) (Holding that drugs and a gun found in a passenger compartment, in combination with the odor of marijuana smoke, provided probable cause to search the trunk, although the odor alone would have been insufficient); United States v. Haley, 669 F.2d 201, 204 (4th Cir.), cert. denied, 457 U.S. 1117 (1982) (Holding that marijuana odor and a bag of marijuana found in a car were sufficient to support a trunk search). However, at least one circuit has held that, “although the smell of burnt marijuana emanating from a vehicle provides probable cause to search the passenger compartment of that vehicle, if that search fails to uncover corroborating evidence of contraband, probable cause to search the trunk of the vehicle does not exist.” United States v. Wald, 216 F.3d 1222, 1229 (10th Cir. 2000) [citing United States v. Nielsen, 9 F.3d 1487, 1491 (10th Cir. 1993)].
- b) **Alcohol.** Finding an open container of alcohol in a vehicle will establish probable cause for a search of that vehicle, including “every part of the vehicle and its contents that could conceal additional contraband, including the area beneath the passenger seat and the trunk.” McGuire, 957 F.2d at 314.

- c) **Weapons.** Discovering weapons in the passenger compartment of a vehicle may also provide probable cause to search the trunk of the vehicle. See, e.g., Brown, 334 F.3d at 1171 (Sustaining search of trunk because it was reasonably likely, in light of what the passenger compartment contained (a pistol) and other evidence (including multiple gunshots heard recently in the neighborhood), that another weapon would be in the trunk); United States v. Alvarez, 899 F.2d 833, 839 (9th Cir. 1990), cert. denied, 498 U.S. 1024 (1991)(Holding that police officers had probable cause to search the trunk after police discovered two concealed weapons on defendant and had reason to believe that the defendant's trunk contained more contraband).
- d) **Stolen Property.** At least one court has found that a search of the trunk for stolen property is permissible where fraudulent identifications and credit cards were found in the passenger compartment. See United States v. Brown, 374 F.3d 1326, 1328-29 (D.C. Cir. 2004) (Probable cause existed to search the trunk for stolen property where a search of the passenger compartment uncovered two false identifications, a credit card in the same name as one of the false identifications, and a batch of checks under the same name on the false identification).
- e) **Canine Alerts to the Passenger Compartment of Vehicle.** When a trained drug dog alerts to the passenger compartment of a vehicle, some (but not all) courts hold that the alert provides probable cause to search the trunk. Compare United States v. Rosborough, 366 F.3d 1145, 1153 (10th Cir. 2004) ("Thus, we hold that a canine alert toward the passenger area of a vehicle gives rise to probable cause to search the trunk as well"), with United States v. Seals, 987 F.2d 1102, 1107 n.8 (5th Cir.), cert. denied, 510 U.S. 853 (1993)(Concluding that an initial canine alert in the passenger compartment gives rise to probable cause to search only the passenger compartment of the vehicle and not the rest of the vehicle).

- b. **Containers May Be Searched Under the Vehicle Exception if the Object of the Search Could Be Located in the Container.** A law enforcement officer may also search locked or unlocked containers located in the vehicle, if the object of the search could be concealed inside. See, e.g., United States v. Knight, 306 F.3d 534, 536 (8th Cir. 2002)(Noting “the probable cause that justifies the search of a vehicle also justifies the search of the containers within the vehicle that could conceal the object of the search”); United States v. Edwards, 242 F.3d 928, 939 (10th Cir. 2001) (Noting “if there is probable cause to search a vehicle, the police are allowed to search any package within the vehicle that is capable of concealing the object of the search”); United States v. Turner, 119 F.3d 18, 22 (D.C. Cir. 1997) (Noting “the police may search any container found in an automobile without a warrant ‘if their search is supported by probable cause’”(citation omitted)). While the rule on containers appears to be relatively straightforward, this issue merits additional discussion.

- 1) **Where Probable Cause Exists Regarding a Specific Container Placed in a Vehicle, the Container May Be Searched.** If a law enforcement officer has probable cause to believe a specific container placed inside a vehicle contains evidence of a crime or contraband, the vehicle may be stopped and searched as is necessary to retrieve that container. Once the container is retrieved, it may be searched without a warrant under the vehicle exception. In these types of situations, the Supreme Court’s decision in California v. Acevedo, 500 U.S. 565 (1991), is controlling. In Acevedo, the police had probable cause that a container placed in the trunk of a vehicle contained marijuana. Believing they might lose the evidence if they sought a search warrant, the officers stopped the vehicle, opened the trunk, and searched the container (a paper bag). Marijuana was found inside the bag. In finding the search of the paper bag legal, the Supreme Court held that, when law enforcement officers have probable cause that a specific container placed inside a vehicle has evidence of a crime or contraband located inside of it, they may search the container, locked or unlocked, under the mobile conveyance exception. However, the probable cause relating to the container does not support a general search of the vehicle. If the officers wish to search the entire vehicle, they must have some other justification to do so, such as consent or a search incident to arrest. As stated by the Supreme Court: “In the case before us, the police had probable cause to believe that the paper bag in the automobile’s trunk contained marijuana. That probable cause now allows a warrantless search of the paper bag. The facts ... reveal that the police did not have probable cause to believe that contraband was hidden in any other part of the automobile and a search of the entire vehicle would have been without probable cause and unreasonable under the Fourth Amendment.” Id. at 580.

- 2) **Where Probable Cause Extends to the Vehicle Generally and Not a Specific Container.** If law enforcement officers have probable cause to search the entire vehicle and discover a closed container during their search, the officers may search the container, whether locked or unlocked, if what they are seeking could be concealed inside of it. As noted by the Supreme Court in Ross, *supra*: "The scope of a warrantless search of an automobile ... is not defined by the nature of the container in which contraband is secreted. Rather, it is defined by the object of the search and the place in which there is probable cause to believe that it may be found." Ross, 456 U.S. at 824.
- 3) **The Vehicle Exception Includes Passenger's Belongings.** Further, the rule of Ross has been extended to include a passenger's belongings. In Wyoming v. Houghton, 526 U.S. 295 (1999), the Supreme Court noted, "neither Ross nor the historical evidence it relied upon admits of a distinction among packages or containers based on ownership." Id. at 302. Accordingly, "police officers with probable cause to search a car may inspect passengers' belongings found in the car capable of concealing the object of the search." Id. at 307.

T. EPO #20: IDENTIFY FACT SITUATIONS WHERE WARRANTLESS SEARCHES ARE ALLOWED DURING EXIGENT CIRCUMSTANCES, E.G., HOT PURSUIT, DESTRUCTION OR REMOVAL OF EVIDENCE, AND EMERGENCY SCENES

1. **General Rule – Warrantless Searches are Permitted Where Exigent Circumstances Exist.** It is firmly ingrained in our system of law that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions.” Mincey v. Arizona, 437 U.S. 385, 390 (1978)(emphasis in original)(citation omitted). However, while “there is a strong preference for searches and entries conducted under the judicial auspices of a warrant, the United States Supreme Court has crafted a few carefully drawn exceptions to the warrant requirement to cover situations where ‘the public interest requires some flexibility in the application of the general rule that a valid warrant is a prerequisite for a search.’” United States v. Holloway, 290 F.3d 1331, 1334 (11th Cir. 2002), cert. denied, 537 U.S. 1161 (2003)[*quoting* Arkansas v. Sanders, 442 U.S. 753, 759 (1979)]. The Supreme Court has recognized that “exigent circumstances” constitute one such exception. Michigan v. Tyler, 436 U.S. 499, 509 (1978)(“Our decisions have recognized that a warrantless entry by criminal law enforcement officials may be legal when there is compelling need for official action and no time to secure a warrant”). See also Warden v. Hayden, 387 U.S. 294, 298-99 (1967)(“The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others”); Radloff v. City of Oelwein, 380 F.3d 344, 348 (8th Cir. 2004)(“An exception to the warrant requirement permits a law enforcement officer to enter and search a home if he acts with probable cause and exigent circumstances exist”).
2. **“Exigent Circumstances” - Defined.** “Exigent circumstances are defined as ‘those circumstances that would cause a reasonable person to believe that entry ... was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.’” United States v. McConney, 728 F.2d 1195, 1199 (9th Cir.)(en banc), cert. denied, 469 U.S. 824 (1984). See also Ewolski v. City of Brunswick, 287 F.3d 492, 501 (6th Cir. 2002)(“Exigent circumstances exist where there are ‘real immediate and serious consequences’ that would certainly occur were a police officer to ‘postpone action to get a warrant’”)(citation and internal brackets omitted).
3. **The Burden of Proving “Exigent Circumstances” is on the Government.** The burden of proving that an “exigent circumstance” existed rests with the government. See United States v. Jeffers, 342 U.S. 48, 51 (1951)(Noting that, when a claim of exigent circumstances is made, “then the burden is on those seeking the exemption to show the need for it”). In such circumstances, the government must show:
 - a. **The Existence of Probable Cause; ... and**
 - b. **The Existence of An Exigent Circumstance.**

See *United States v. Tobin*, 923 F.2d 1506, 1510 (11th Cir.), cert. denied, 502 U.S. 907 (1991) (“A warrantless search is allowed, however, where both probable cause and exigent circumstances exist”); *United States v. Lindsey*, 877 F.2d 777, 780 (9th Cir. 1989) (When exigent circumstances are claimed, “the burden is on the government to demonstrate that: (1) the police had probable cause to search [the defendant’s] apartment; and (2) exigent circumstances excused the lack of a warrant”).

4. **To Have An Exigency, An Officer Must Have An Objectively Reasonable Belief.** “In evaluating whether a warrantless entry was justified by exigent circumstances, we consider the circumstances that confronted the police at the time of the entry.” *United States v. Leverington*, 397 F. 3d 1112, 1116 (8th Cir. 2005). Accordingly, the question that must be addressed in an exigent circumstances cases is “what an objectively reasonable officer on the scene could have believed, for if such an officer would have had sufficient grounds to believe there was an exigency, then the Fourth Amendment did not require a warrant, and the suspect’s constitutional rights were not violated by a warrantless entry.” *Id.*
5. **There Are a Variety of Factors to Consider in Determining Whether an “Exigency” Exists Justifying a Warrantless Entry Into a Home.** “The essential question in determining whether exigent circumstances justified a warrantless entry is whether law enforcement agents were confronted by an ‘urgent need’ to render aid or take action.” *United States v. MacDonald*, 916 F.2d 766, 769 (2d Cir. 1990)(en banc), cert. denied, 498 U.S. 119 (1991). Among the factors considered by courts in determining whether “exigent” circumstances actually existed are the following:
 - a. The Gravity or Violent Nature of the Offense With Which the Suspect is to Be Charged;
 - b. A Reasonable Belief That the Suspect is Armed;
 - c. Probable Cause to Believe That the Suspect Committed the Crime;
 - d. Strong Reason to Believe That the Suspect is in the Premises Being Entered;
 - e. A Likelihood That Delay Could Cause the Escape of the Suspect or the Destruction of Essential Evidence; or
 - f. Jeopardize the Safety of Officers or the Public.

See, e.g., MacDonald, 916 F.2d at 769; United States v. Hicks, 389 F.3d 514 (5th Cir. 2004)(Noting that “exigent circumstances include those in which officers reasonably fear for their safety, where firearms are present, or where there is a risk of a criminal suspect’s escaping or fear of destruction of evidence”) (citation omitted); United States v. Reed, 572 F.2d 412, 424 (2d Cir.), cert. denied, 439 U.S. 913 (1978); United States v. Standridge, 810 F.2d 1034, 1037 (11th Cir.)(per curiam), cert. denied, 481 U.S. 1072 (1987); United States v. Baldacchino, 762 F.2d 170, 176 (1st Cir. 1985); United States v. Kulcsar, 586 F.2d 1283, 1287 (8th Cir. 1978); United States v. Phillips, 497 F.2d 1131, 1135 (9th Cir. 1974); United States v. Shye, 492 F.2d 886, 891 (6th Cir. 1974) (per curiam); Vance v. North Carolina, 432 F.2d 984, 990 (4th Cir. 1970).

6. **Once the Exigency Ends, a Law Enforcement Officer’s Right to Search Terminates.** The scope of a warrantless search is “strictly circumscribed by the exigencies which justify its initiation.” Mincey, 437 U.S. at 393 (citation omitted). Thus, once the emergency circumstances that justified the warrantless entry have been concluded, the right to conduct a warrantless search also concludes. See also United States v. Goree, 365 F.3d 1086, 1090 (D.C. Cir. 2004)(Noting that, under exigent circumstances exception, “the subsequent search must be ‘no broader than necessary’”(citation omitted); United States v. Pierson, 219 F.3d 803, 806 (8th Cir. 2000)(Warrantless entry under exigent circumstances “must be ‘limited in scope to the minimum intrusion necessary to prevent the destruction of evidence’”); United States v. Aquino, 836 F.2d 1268, 1272 (10th Cir. 1988)(same).

7. **There Are Three Recurring Types of Exigent Circumstances.** A number situations are covered under the definition of “exigent circumstances.” *See, e.g., Holloway*, 290 F.3d at 1334 (This exception “encompasses several common situations where resort to a magistrate for a search warrant is not feasible or advisable, including danger of flight or escape, loss or destruction of evidence, risk of harm to the public or the police ... and hot pursuit”); *United States v. Reid*, 69 F.3d 1109, 1113 (11th Cir. 1995)(“Recognized situations in which exigent circumstances exist include: ‘danger of flight or escape; danger of harm to police officers or the general public; risk of loss, destruction, removal, or concealment of evidence; and hot pursuit of a fleeing suspect’”(citation omitted); *United States v. Rohrig*, 98 F.3d 1506, 1515 (6th Cir. 1996)(“While it is not possible to articulate a succinct yet exhaustive list of circumstances that qualify as “exigent,” we have previously characterized the situations in which warrantless entries are justified as lying within one of four general categories: (1) hot pursuit of a fleeing felon, (2) imminent destruction of evidence, (3) the need to prevent a suspect’s escape, and (4) a risk of danger to the police or others”); *United States v. Francis*, 327 F.3d 729, 735 (8th Cir. 2003)(“Although the exigent-circumstances exception is narrowly drawn ... it does justify immediate police action without a warrant under limited circumstances, such as where lives are threatened, a suspect’s escape is imminent, or evidence is about to be destroyed”). Discussed below are three of the most common types of exigent circumstances encountered by law enforcement officers.
- a. **One Type of Exigent Circumstance is “Hot Pursuit.”** “The ‘hot pursuit’ justification for warrantless entry into a house derives primarily from the Supreme Court cases of *Warden v. Hayden*, 387 U.S. 294 (1967), and *United States v. Santana*, 427 U.S. 38 (1976).” *United States v. Rohrig*, 98 F.3d 1506, 1515 (6th Cir. 1996). While the concept of “hot pursuit” is used often when discussing exigent circumstances, defining what is meant by the term is more problematic. In general, the following elements must exist for “hot pursuit” to be viable:
- 1) **The Pursuit Must Begin in a Public Place.** First, “hot pursuit” occurs when a suspect enters a home from a public place. As noted by the Supreme Court: “A suspect may not defeat an arrest which has been set in motion in a public place ... by the expedient of escaping to a private place.” *United States v. Santana*, 427 U.S. 38, 43 (1976). *See also Warden v. Hayden*, 387 U.S. 294 (1967).
 - 2) **A Law Enforcement Officer Must Have Probable Cause to Arrest.** Second, probable cause must exist to arrest the suspect. *See, e.g., United States v. Lopez*, 989 F.2d 24, 27 (1st Cir.), cert. denied, 510 U.S. 872 (1993); *United States v. Jones*, 204 F.3d 541, 543 (4th Cir. 2000); *United States v. Sewell*, 942 F.2d 1209, 1212 (7th Cir. 1991), cert. denied, 503 U.S. 962 (1992); *United States v. Ramos*, 933 F.2d 968, 972 (11th Cir. 1991), cert. denied, 503 U.S. 908 (1992).

- 3) **The Crime Involved in the “Hot Pursuit” Must Be “Serious.”** Third, the warrantless entry into the home must be for a “serious” crime. “An important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made.” Welsh v. Wisconsin, 466 U.S. 740, 753 (1984). As a practical matter, this means that the more “serious” the crime, the more likely that the warrantless entry to arrest will be upheld. While the Supreme Court in Welsh declined to “consider whether the Fourth Amendment may impose an absolute ban on warrantless home arrests for certain minor offenses,” Id. at 750 n.11, they nonetheless noted “it is difficult to conceive of a warrantless home arrest that would not be unreasonable under the Fourth Amendment when the underlying offense is extremely minor.” Id. at 753. See, e.g., United States v. Mayo, 792 F. Supp. 768, 772 (M.D. Ala. 1992)(“The offense of menacing, although categorized as a misdemeanor, involves threats of ‘imminent serious physical injury’ which could support a warrantless in-home arrest. This element of physical violence distinguishes menacing from other misdemeanor offenses that have been deemed too “minor” to justify a warrantless home arrest”).
- 4) **There Must Be Immediate or Continuous Pursuit.** Fourth, there must be an “immediate or continuous” pursuit of the suspect for “hot pursuit” to apply. See Welsh, 466 U.S. at 753 (“The claim of hot pursuit is unconvincing because there was no immediate or continuous pursuit of the [defendant] from the scene of a crime”); United States v. Johnson, 256 F.3d 895, 907 (9th Cir. 2001)(“The hot pursuit exception to the warrant requirement only applies when officers are in ‘immediate’ and ‘continuous’ pursuit of a suspect from the scene of the crime”); United States v. Baldacchino, 762 F.2d 170, 177 (1st Cir. 1985)(“The pursuit must be immediate or relatively continuous to justify the failure to secure a warrant”); United States v. Lyons, 2000 U.S. Dist. LEXIS 14890 at *5 (E.D. La. 2000)(“The ‘hot pursuit’ exception is evidenced by facts indicating that there was an immediate or continuous pursuit from the scene of the crime”).

5) **There Must Be Probable Cause to Enter the Residence.** Finally, an important limitation to the doctrine of exigent circumstances is that these circumstances “justify a warrantless entry into a residence only when there is also probable cause to enter the residence.” United States v. Johnson, 9 F.3d 506, 509 (6th Cir. 1993). See also United States v. Jones, 239 F.3d 716, 719 & n.2 (5th Cir. 2001); United States v. Burgos, 720 F.2d 1520, 1525 (11th Cir. 1983); United States v. Turner, 650 F.2d 526, 528 (4th Cir. 1981). United States v. Socey, 846 F.2d 1439, 1444 n.5 (D.C. Cir.), cert. denied, 488 U.S. 858 (1988); United States v. Aquino, 836 F.2d 1268, 1272 (10th Cir. 1988); United States v. Howard, 828 F.2d 552, 555 (9th Cir. 1987); United States v. Cresta, 825 F.2d 538, 553 (1st Cir. 1987).

b. **Another Situation in Which “Exigent Circumstances” Have Been Found to Exist Involves the Destruction or Removal of Evidence.** “The law is well-settled that a warrantless entry will be sustained when the circumstances then extant were such as to lead a person of reasonable caution to conclude that evidence of a federal crime would probably be found on the premises and that such evidence would probably be destroyed within the time necessary to obtain a search warrant.” United States v. Radka, 904 F.2d 357, 362 (6th Cir. 1990). See also United States v. Esparza, 162 F.3d 978, 980 (8th Cir. 1998) (“Officers may search without a warrant when faced with certain urgent circumstances, such as the imminent destruction of evidence”); United States v. Marshall, 157 F.3d 477, 482 (7th Cir.), cert. denied, 525 U.S. 1045 (1998) (“Exigent circumstances have been found to exist when ‘the police have an objective and reasonable fear that evidence is about to be destroyed’”)(citation omitted); United States v. Cuaron, 700 F.2d 582, 586 (10th Cir. 1983) (“When officers have reason to believe that criminal evidence may be destroyed ... or removed ... before a warrant can be obtained, the circumstances are considered sufficiently critical to permit officers to enter a private residence in order to secure the evidence while a warrant is sought”).

1) **The Test for Entries to Prevent the Destruction of Evidence is Objective.** When examining whether a warrantless entry to prevent the destruction of evidence is permissible, “the test is necessarily objective, and the determination of exigent circumstances will vary from case to case, depending upon the ‘inherent necessities of the situation at the time.’” United States v. Tovar-Rico, 61 F.3d 1529, 1535 (11th Cir. 1995). See also Marshall, 157 F.3d at 482 (same).

- 2) **Courts Have Announced Different Requirements Necessary to Justify a Warrantless Entry to Prevent the Destruction of Evidence.** The circuit courts of appeal have announced different requirements that must be met before a warrantless entry to prevent destruction of evidence would be permissible.

a) **The Sixth, Eighth and D.C. Circuits.** In the Sixth, Eighth, and D.C. Circuit Courts of Appeal, a “warrantless entry to prevent the destruction of evidence” is justified if the government demonstrates” two factors:

- (1) **Third Parties Inside.** First, the government must show a reasonable belief that third parties are inside the dwelling.
- (2) **Loss or Destruction Imminent.** Second, the government must show a reasonable belief that the loss or destruction of evidence is imminent.

United States v. Gaitan-Acevedo, 148 F.3d 577, 585 (6th Cir. 1998) (citation omitted). See *also* United States v. Socey, 846 F.2d 1439, 1445 (D.C. Cir.), *cert. denied*, 488 U.S. 858 (1988)(“A police officer can show an objectively reasonable belief that contraband is being, or will be, destroyed within a home if he can show (1) a reasonable belief that third persons are inside a private dwelling and (2) a reasonable belief that these third persons are aware of an investigatory stop or arrest of a confederate outside the premises so that they might see a need to destroy evidence”); United States v. Munoz, 894 F.2d 292, 296 (8th Cir.), *cert. denied*, 495 U.S. 909 (1990)(“A warrantless search of a residence is justified ... to prevent the destruction of evidence if factual circumstances demonstrate ‘a sufficient basis for an officer to believe somebody in the residence will likely destroy evidence’”)(citation omitted).

b) **The Tenth Circuit Court of Appeals.** The Tenth Circuit Court of Appeals, however, has announced a four-part test to determine whether the imminent destruction of evidence will justify a warrantless entry. Under the Tenth Circuit’s approach, “[a]n exception to the warrant requirement that allows police fearing the destruction of evidence to enter the home of a suspect should” meet four requirements:

- (1) **Probable Cause.** First, any entry should be made pursuant to clear evidence of probable cause.

- (2) **Serious Crimes Only.** Second, a warrantless entry is available only for serious crimes and in circumstances where the destruction of evidence is likely.
- (3) **Limited in Scope.** Third, the entry must be limited in scope to the minimum intrusion necessary.
- (4) **Clear Exigency.** Finally, the entry must be supported by clearly defined indicators of exigency that are not subject to police manipulation or abuse.

United States v. Scroger, 98 F.3d 1256, 1259 (10th Cir. 1996), cert. denied, 520 U.S. 1149 (1997). Even the Tenth Circuit has recognized, however, that “when officers have reason to believe that criminal evidence may be destroyed or removed before a warrant can be obtained, the circumstances are considered sufficiently critical to permit a warrantless entry.” *Id.* at 1260 (citations omitted).

- c. **A Third Situation in Which “Exigent Circumstances” Have Been Found to Exist Involves Crime Scene Emergencies.** “Although the Supreme Court has never provided a complete catalog of the exigencies that satisfy the exception, it has recognized that ‘the need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.’” Goree, 365 F.3d at 1089 (citations omitted). Based on this, “[t]hreats to public safety are widely accepted as one of the exigent circumstances exceptions to the Fourth Amendment’s warrant requirement.” Rhiger, 315 F.3d at 1293. Accordingly, “numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid.” Mincey v. Arizona, 437 U.S. 385, 392 (1978). See also United States v. Kempf, 400 F.3d 501, 503 (7th Cir. 2005) (“An example of exigent circumstances is when police reasonably fear for their safety or the safety of someone inside the premises”); Leverington, 397 F.3d at 1117 (“The Fourth Amendment does not require certitude before police may act without a warrant to protect persons or evidence; as we understand the Supreme Court, a showing of probable cause is sufficient”); Holloway, 290 F.3d at 1335-1337 (Noting that “one of the most compelling events giving rise to exigent circumstances is the occurrence of an emergency situation,” and emphasizing that, “although the Fourth Amendment protects the sanctity of the home, its proscription against warrantless searches must give way to the sanctity of human life”).
- 1) **Examples of “Emergency” Situations.** Examples of “emergency” situations in which courts found exigent circumstances to exist include the following:

- a) **Report of Woman and Child in Danger in Crack House**, United States v. Hughes, 993 F.2d 1313 (7th Cir. 1993);
- b) **Stabbing Victim**, United States v. Gillenwaters, 890 F.2d 679 (4th Cir. 1989);
- c) **Explosion in Apartment**, United States v. Martin, 781 F.2d 671 (9th Cir. 1985);
- d) **Open Access to Controlled Substances by Children**, Mann v. Cannon, 731 F.2d 54 (1st Cir. 1984);
- e) **Medical Aid to Defendant Shot by Police**, United States v. Riccio, 726 F.2d 638 (10th Cir. 1984); and
- f) **Reports of Gunshots**, United States v. Jones, 635 F.2d 1357 (8th Cir. 1980).
- g) **Blood Puddle on Driveway With Trail Leading Into the Home**, United States v. Janis, 387 F.3d 682 (8th Cir. 2004)
- h) **Fistfight inside residence seen by officers from outside screen door.** Brigham City v Stuart, 547 U.S. 398 (2006).
- i) *** **Michigan v. Fisher**, 2009 U.S. LEXIS 8773 (2009): Sent to a residence “where a man was “going crazy.’ ... [LEO] found a household in considerable chaos: a pickup truck in the driveway with its front smashed, damaged fenceposts along the side of the property, and three broken house windows, the glass still on the ground outside. The officers also noticed blood on the hood of the pickup and on clothes inside of it, as well as on one of the doors to the house. Through a window, the officers could see...Fisher, inside the house, screaming and throwing things. The back door was locked, and a couch had been placed to block the front door. The officers knocked, but Fisher refused to answer. They saw that Fisher had a cut on his hand....” The officers’ warrantless entry to render “emergency aid” was deemed reasonable by the Supreme Court in this per curiam opinion. Of note, “[p]recedent is clear that the ‘risk of danger’ exigency applies only to situations involving the ‘need to protect or preserve life or avoid serious injury either of police officers themselves or of others.’” United States v. Williams, 342 F.3d 430, 438 (6th Cir. 2003) (citation omitted).

NOTE: “Numerous ... circuits have found that probable cause to believe a burglary is in progress constitutes exigent circumstances sufficient to permit warrantless entry.” In Re Sealed Case 96-3167, 96-3167, 153 F.3d 759, 766 (D.C. Cir. 1998). See, e.g., United States v. Tibolt, 72 F.3d 965, 970 (1st Cir. 1995), cert. denied, 518 U.S. 1020 (1996)(Activation of an alarm system supported warrantless entry to check for burglary); Murdock v. Stout, 54 F.3d 1437, 1442 (9th Cir. 1995)(“The officers prudently attempted to make contact with the resident, no doubt to make sure the resident was safe in light of the officers' concern that a burglary or other crime might have occurred”); United States v. Johnson, 9 F.3d 506, 509 (6th Cir. 1993)(“Several of our sister circuits, however, have upheld warrantless searches conducted during burglary investigations under the rubric of exigent circumstances”); Reardon v. Wroan, 811 F.2d 1025, 1030 (7th Cir. 1987)(Exigent circumstances existed where officers “were faced with a call reporting a burglary in progress during a time of year when the students were on break and burglaries were known to occur more frequently”); United States v. Dart, 747 F.2d 263, 267 (4th Cir. 1984)(Finding exigent circumstances where “warehouse had clearly been burglarized, and [the officer] had reason to believe that the perpetrators were still on the premises”).

- 2) **The Requirements for a Valid Emergency Scene Search Conducted Without a Warrant Include an Exigency and Probable Cause.** “In validating a warrantless search based on the existence of an emergency, as with any other situation falling within the exigent circumstances exception, the Government must demonstrate both exigency and probable cause.” Holloway, 290 F.3d at 1337. More specifically, a valid emergency scene search must usually meet two requirements:
- a) **Emergency Exists.** First, the police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property.

- b) **Probable Cause.** Second, there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.

As was made clear by the Supreme Court in Brigham City, the subjective motivation of the officers at the emergency scene are irrelevant so long as there is an objectively reasonable basis to believe that both requirements are present. Brigham City, 547 U.S. at 404-405.

NOTE: As with any exigent circumstance, “an officer’s search [under the emergency scene exception] must be limited to only those areas necessary to respond to the perceived emergency.” Martin v. Oceanside, 360 F.3d 1078, 1082 (9th Cir. 2004)(citing Cervantes, 219 F.3d at 890).

- 3) **The Probable Cause Standard is Different in Emergency Scene Searches.** “In the typical case, probable cause exists where the circumstances would lead a reasonable person to believe a search will disclose evidence of a crime. In emergencies, however, law enforcement officers are not motivated by an expectation of seizing evidence of a crime. Rather, the officers are compelled to search by a desire to locate victims and the need to ensure their own safety and that of the public.” Holloway, 290 F.3d at 1337 (internal citation omitted). Accordingly, “probable cause for a forced entry in response to exigent circumstances requires finding a probability that a person is in ‘danger.’” Koch v. Town of Brattleboro, 287 F.3d 162, 169 (2d Cir. 2002); Holloway, 290 F.3d at 1137.

- 4) **Evidence Found in “Plain View” During an Emergency Scene Search May Be Seized.** “The police may seize any evidence that is in plain view during the course of their legitimate emergency activities.” Mincey, 437 U.S. at 393; Michigan v. Tyler, 436 U.S. 499, 509 (1978)(Once inside a building to fight a fire, “firefighters may seize evidence of arson that is in plain view”); Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971)(“Where the initial intrusion that brings the police within plain view of such an article is supported, not by a warrant, but by one of the recognized exceptions to the warrant requirement, the seizure is also legitimate”); Cervantes, 219 F.3d at 888 (“The emergency doctrine provides that if a police officer, while investigating within the scope necessary to respond to an emergency, discovers evidence of illegal activity, that evidence is admissible even if there was not probable cause to believe that such evidence would be found”); Janis, 387 F.3d at 688 (Where officers entered pursuant to exigent circumstances and observed three weapons in plain view, seizure was justified under plain view doctrine).
- 5) **There is No “Murder Scene” Exception to the Fourth Amendment.** In three separate cases, the Supreme Court has rejected attempts at creating a blanket “murder scene” exception to the Fourth Amendment. In Mincey v. Arizona, 437 U.S. 385, 394 (1978), the Court declined “to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search.” Later, in Thompson v. Louisiana, 469 U.S. 17, 21 (1984), the Court found a “murder scene” exception “inconsistent with the Fourth and Fourteenth Amendments.” Finally, in Flippo v. West Virginia, 528 U.S. 11, 14 (1999), the Court reiterated their earlier rejections of a “murder scene exception” to the Warrant Clause of the Fourth Amendment.”

U. EPO #21: IDENTIFY THE REQUIREMENTS AND SCOPE OF A SEARCH INCIDENT TO A LAWFUL ARREST

1. **General Rule – Searches Incident to Arrest are an Exception to the Warrant Requirement.** It has long been recognized that a search conducted incident to a lawful custodial arrest “is not only an exception to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable’ search under that Amendment.” United States v. Robinson, 414 U.S. 218, 224 (1973). *See also* United States v. Jackson, 377 F.3d 715, 716 (7th Cir. 2004)(Noting that “a search incident to arrest is automatically valid under the Fourth Amendment”); United States v. Goddard, 312 F.3d 1360, 1364 (11th Cir. 2002), *cert. denied*, 538 U.S. 969 (2003)(“Since the custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment, a search incident to the arrest requires no additional justification”).

2. **There are Three Distinct Justifications for Permitting Searches Incident to Arrest.** In Chimel v. California, 395 U.S. 752 (1969), the Supreme Court outlined three distinct reasons for permitting searches incident to arrest: (1) to discover weapons; (2) to prevent the destruction or concealment of evidence; and (3) to discover any means of escape. As noted by the Court:

“When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to **remove any weapons that the latter might seek to use in order to resist arrest or effect his escape**. Otherwise, the officer’s safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize **any evidence on the arrestee’s person in order to prevent its concealment or destruction**.” Id. at 762.

See *also* Robinson, 414 U.S. at 234 (“The justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial”); United States v. Edwards, 415 U.S. 800, 802-03 (1974)(Noting exception permitting searches incident to arrest “has traditionally been justified by the reasonableness of searching for weapons, instruments of escape, and evidence of crime when a person is taken into official custody and lawfully detained”)(*citing Robinson, supra*).

3. **The Justifications Do Not Need to Be Particular to the Suspect in a Given Case.** “A search incident to arrest is justified by the concern for officer safety and the need to collect evidence of the offense. ... But, the presence of either justification need not be established in a particular case. That is, officers need not have any reason to think the individual is armed or that evidence of the crime will be found on his person. It is the fact of arrest that enables the officer to conduct a search, not a particularized suspicion as to the suspect’s dangerousness.” United States v. Pratt, 355 F.3d 1119, 1121 (8th Cir. 2004)(internal citations omitted). See *also* Jackson, 377 F.3d at 716 (Noting that “police are entitled to search the persons and possessions of everyone arrested on probable cause, with or without any reason to suspect that the person is armed or carrying contraband”).

4. **There are Two Requirements for a Valid Search Incident to Arrest.** A search incident to arrest may only be conducted when two (2) requirements have been met.

- a. **The First Requirement of a Search Incident to Arrest is That a Custodial Arrest Occur.** First, there must be a lawful custodial arrest for a search incident to arrest to be permissible. At a minimum, this requires that (1) probable cause exist to believe that the arrestee has committed a crime and (2) an arrest is actually made. A search incident to arrest may not be conducted in a situation where an actual arrest does not take place. See United States v. Robinson, 414 U.S. 218, 235 (1973); Jackson, 377 F.3d at 717 (Noting “it is *custody*, and not a stop itself, that makes a full search reasonable”)(emphasis in original); McCardle v. Haddad, 131 F.3d 43 (2d Cir. 1997)(Search incident to arrest not valid where 10-minute detention in backseat of patrol vehicle did not amount to an arrest).
- 1) **Searches Incident to Arrest May Not Be Conducted in Terry Stop Situations.** For example, a search incident to arrest may not be conducted in a Terry-type situation, in that “an arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different. Robinson, 414 U.S. at 228.

- 2) **Searches Incident to “Citation” Are Not Permissible.** Illustrative on this point is Knowles v. Iowa, 525 U.S. 113 (1998), where the Supreme Court struck down an Iowa statute that permitted an officer to conduct a “search incident to citation” in those cases where a law enforcement officer had probable cause to arrest a suspect for a traffic violation, but chose, instead, simply to issue a traffic citation. Citing Robinson, *supra*, the Supreme Court noted that the Iowa statute did not implicate the two historical justifications permitting a search incident to arrest, namely, (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial. First, a custodial arrest “involves danger to an officer because of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station.” Knowles, 525 U.S. at 117; *see also* Washington v. Chrisman, 455 U.S. 1, 7 (1982) (“Every arrest must be presumed to present a risk of danger to the arresting officer. There is no way for an officer to predict reliably how a particular subject will react to arrest or the degree of the potential danger. Moreover, the possibility that an arrested person will attempt to escape if not properly supervised is obvious”) (citations omitted). The same degree of danger noted in Knowles and Chrisman is not present when a law enforcement officer is issuing a traffic citation. Second, the likelihood of evidence being destroyed in the type of situation addressed by the Iowa law was minimal. *See, e.g., United States v. Garcia*, 376 F.3d 648, 650 (7th Cir. 2004) (“Most drivers are given citations and sent on their way. Because the principal justifications for full searches are the need to detect risks to the arresting officers and to preserve evidence that suspects could destroy on the way to the lockup, there is slight warrant for intrusive steps when detention is brief and the drivers (and most evidence) will soon depart”).

- b. **The Second Requirement of a Search Incident to Arrest is That the Search Occur “Contemporaneous” With the Arrest.** The second requirement for a lawful search incident to arrest is that the search must be “substantially contemporaneous” with the arrest. New York v. Belton, 453 U.S. 454 (1981). See also Stoner v. California, 376 U.S. 483, 486 (1964); Preston v. United States, 376 U.S. 364, 367-368 (1964); United States v. Mitchell, 64 F.3d 1105, 1110 (7th Cir. 1995), cert. denied sub nom. Johnson v. United States, 517 U.S. 1158 (1996)(Noting that any search incident to arrest “must be contemporaneous with arrest”). Unfortunately, what exactly is meant by this phrase is open to interpretation. In United States v. Turner, 926 F.2d 883 (9th Cir.), cert. denied, 502 U.S. 830 (1991), the court stated that a search incident to arrest must be conducted “at about the same time as the arrest.” Id. at 887. While very general, this comment reiterates the Supreme Court’s mandate that, when a search is too remote in time or place from the arrest, the search cannot be justified as incident to the arrest. Preston, 376 U.S. at 367.

- 1) **Whether a Search was “Substantially Contemporaneous” With the Arrest is Judged Based on the Totality of the Circumstances.** Whether a search was “substantially contemporaneous,” is an issue that must be reviewed in light of the Fourth Amendment’s general reasonableness requirement, taking into consideration all of the circumstances surrounding the search. Thus, while a search conducted 15 minutes after an arrest might be valid in one case, Curd v. City of Judsonia, 141 F.3d 839 (8th Cir.), cert. denied, 525 U.S. 888 (1998)(Warrantless search of purse at police station found to be valid as incident to arrest even though search occurred 15 minutes after the defendant’s arrest at home), a search 30 to 45 minutes after the arrest might be invalid in another. United States v. Vasey, 834 F.2d 782 (9th Cir. 1987) (Warrantless search held not incident to arrest and invalid when the search took place 30 to 45 minutes after the defendant had been arrested, handcuffed, and placed in patrol vehicle). United States v. Hrasky, 453 F. 3d 1099 (8th Cir. 2006) (A one hour delay from the time a driver with a suspended license was placed in the police car until the search incident to arrest was upheld where the defendant spent most of that time trying (unsuccessfully) to negotiate his release on the basis of offering to provide information on narcotics activity.)

- 2) **A Variety of Factors are Considered in Determining Whether the Search was “Substantially Contemporaneous” With the Arrest.** Among the factors to be considered in determining whether a search was “contemporaneous” with the arrest are where the search was conducted; when the search was conducted in relation to the arrest; and whether the defendant was present at the scene of the arrest during the search. See, e.g., United States v. McLaughlin, 170 F.3d 889, 892 (9th Cir. 1999)(Held that search of vehicle that took place approximately 5 minutes after the defendant had been arrested and removed from the scene was contemporaneous with the arrest. When analyzing definition of “contemporaneous,” court noted that “some courts have characterized the critical issue as whether the arresting officers conducted the search as soon as it was practical to do so, including whether the officers took intervening actions not directly related to the search”)(citation omitted). In sum, if it can be safely accomplished, the search incident to arrest should be conducted at the scene of the arrest, as soon as possible after the arrest, and before the defendant is removed from the area.
- 3) **In Limited Circumstances, the Search May Take Place Before the Actual Arrest Occurs.** “Where the formal arrest follow[s] quickly on the heels of the ... search of [the defendant’s] person,” the Supreme Court has found that it is not “particularly important that the search preceded the arrest rather than vice versa.” Rawlings v. Kentucky, 448 U.S. 98, 111 (1980). See also United States v. Goddard, 312 F.3d 1360, 1364 (11th Cir. 2002), cert. denied, 538 U.S. 969 (2003); and United States v. Powell, 483 F.3d 836 (police may conduct a search incident to arrest of a suspect whom they have probable cause to arrest if the formal arrest follows quickly on the heels of the challenged search). Indeed, every circuit that has considered the question-save one-has concluded that a search incident to arrest may precede the arrest. See, e.g., United States v. Bizier, 111 F.3d 214, 217 (1st Cir. 1997); United States v. Currence, 446 F.3d 554, 557 (4th Cir. 2006); United States v. Hernandez, 825 F.2d 846, 852 (5th Cir. 1987); United States v. Montgomery, 377 F.3d 582, 588 (6th Cir. 2004); United States v. Ilazi, 730 F.2d 1120, 1126-27 (8th Cir. 1984); United States v. Banshee, 91 F.3d 99, 102 (11th Cir. 1996). Only the Seventh Circuit has held that a *Belton* search may not precede a custodial arrest, but it did so in an opinion that, like the briefs then before it, betrayed no awareness of the Supreme Court’s holding in Rawlings. See Ochana v. Flores, 347 F.3d 266, 270 (7th Cir. 2003)..

5. **A Search Incident to Arrest May Be Conducted Even After An Arrestee Has Been Handcuffed.** A number of federal courts, although not all, have upheld searches incident to arrest that were conducted after the arrestee was secured in handcuffs. Those courts that have allowed such a search include the Fourth, Seventh, Eighth, Ninth, and D.C. Circuits. See Mitchell, 64 F.3d at 1110 (“We do not believe that Johnson’s handcuffing destroyed Lewellen’s justification for searching the briefcase”); Nohara, 3 F.3d at 1243 (Noting “the officers ... did not make the search unreasonable by handcuffing Nohara, seating him in the hallway, and searching the black bag within two to three minutes of his arrest”); United States v. Abdul-Saboor, 85 F.3d 664, 667-71 (D.C. Cir. 1996)(Upholding search incident to arrest even though arrestee was in handcuffs); United States v. Silva, 745 F.2d 840, 847 (4th Cir. 1984), cert. denied, 470 U.S. 1031 (1985)(Search incident to arrest upheld where the arrestees were handcuffed behind their backs, and as they sat on a motel room bed, an officer searched a locked, zippered bag which contained two firearms and ammunition”); United States v. Palumbo, 735 F.2d 1095, 1097 (8th Cir.), cert. denied, 469 U.S. 934 (1984)(Court rejected appellant’s argument that a search was not incident to his arrest because “the cocaine, hidden behind a dresser drawer, was inaccessible to him because he was handcuffed and in the presence of several officers”); United States v. Roper, 681 F.2d 1354, 1357-59 (11th Cir. 1982), cert. denied sub nom. Newton v. United States, 459 U.S. 1207 (1983) (arrestee handcuffed in hallway of motel and escorted inside room by agents prior to search of briefcase). Alternatively, the Third Circuit Court of Appeals has refused to permit a search incident to arrest of an arrestee who is handcuffed and physically unable to reaccess the lunging area. See United States v. Myers, 308 F.3d 251, 267 (3d Cir. 2002) (Because arrestee was “handcuffed behind his back while lying face down on the floor ...[while] ‘covered’ by two armed police officers” when the search occurred, search of bag impermissible because arrestee would have had to have been “an acrobat or a Houdini” in order to gain access).
6. **The Permissible Scope of a Search Incident to Arrest Varies Depending on the Context.** The permissible scope of a search incident to arrest can be described as follows:
- a. **A Law Enforcement Officer May Search a Suspect’s Person Incident to Arrest.** When a law enforcement officer makes a custodial arrest of an individual, the officer is entitled to search the suspect’s person. United States v. Robinson, 414 U.S. 218, 235 (1973)(“We hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable’ search under that Amendment”); Chimel v. California, 395 U.S. 752, 762-763 (1969)(“When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape”); United States v. Pratt, 355 F.3d at 1121 (Noting that, “if an officer has arrested the individual, the officer may search the individual’s person incident to that arrest and may reach into his pockets”).

- 1) **Strip and Visual Body Cavity Searches Incident to Arrest.** To be reasonable as part of a search incident to arrest, strip and visual body cavity searches must be justified by at least a reasonable suspicion that the arrestee is concealing contraband or weapons. The manner of the search, including the place in which it is conducted, must also be reasonable. Absent the most compelling circumstances, such as those that pose potentially serious risks to the arresting officer or others in the vicinity, it is unreasonable to conduct a strip search in an area exposed to the general view of persons known to be in the vicinity whether or not any actually viewed the search. Campbell v. Miller, 486 F.3d 949 (7th Cir. 2007).
- 2) **What Degree of Intrusion Qualifies as a “Strip Search?”** “A strip search under federal law includes the exposure of a person’s naked body for the purpose of a visual or physical examination.” Amaechi v. West, 237 F.3d 356, 363 (4th Cir. 2001); citing United States v. Vance, 62 F.3d 1152, 1156 (9th Cir. 1995) (treating pulling down a suspect’s trousers and underwear in public as a strip search); United States v. Cardenas, 9 F.3d 1139, 1145 (5th Cir. 1993) (noting that directing a suspect to undress amounts to a strip search)). While this definition tells us what kinds of searches are *included* in the term “strip search,” it does not provide an exhaustive list. Notably, federal courts have begun turning to state law to determine the parameters of a strip search. See, e.g., Amaechi, 237 F.3d at 365 (“[B]ecause states define strip search in a uniform fashion . . . we find state law persuasive on our interpretation of what constitutes a strip search.”) Many state statutes contain language such as: “‘Strip search’ means having an arrested person remove or arrange some or all of his or her clothing so as to permit a visual inspection of the genitals, buttocks, anus, female breasts or undergarments of such person.” 725 ILCS 5/103-1 (emphasis added); see also, Va. Code Ann. 19.2-59.1(A); Colo. Rev. Stat. Ann. § 16-3-405 (West 1998); Conn. Gen. Stat. Ann. § 54-33k (West 1994); Fla. Stat. Ann. § 901.211 (West 1996); Iowa Code Ann. § 702.23 (West 1993); Ohio Rev. Code § 2933.32(A)(2). Based on these state law definitions, which are relied upon heavily by the federal courts, one could argue that even arranging an arrestee’s clothing to permit inspection of part of the underwear is a strip search.

- b. **A Law Enforcement Officer May Also Search Incident to an Arrest the Area Within the Arrestee's "Immediate Control."** Upon making a custodial arrest, a law enforcement officer is also entitled to search any area within the suspect's "immediate control." *Chimel v. California*, 395 U.S. 752, 763 (1969) ("There is ample justification ... for a search of the arrestee's person and the area 'within his immediate control' – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence").

- 1) **Factors to Consider in Determining What is Reasonably An Area Within An Arrestee's "Immediate Control."** In deciding what areas are reasonably within an arrestee's "immediate control," the following factors should be considered:

- a) **Distance.** The distance between the arrestee and the place searched.
- b) **Restraints.** Whether the arrestee was handcuffed or otherwise restrained.
- c) **Positioning.** Whether the police were positioned so as to block the arrestee from the area searched.
- d) **Access.** The ease of access to the area itself.
- e) **Numbers.** The number of officers present.

3 W. LaFare, *Search and Seizure* § 6.3(c), at 306-07 (3d ed. 1996). See also *United States v. Tarazon*, 989 F.2d 1045, 1051 (9th Cir.), cert. denied, 510 U.S. 853 (1993) (Search incident to arrest upheld where "the officials searched the drawers of the desk Tarazon and Serna were sitting behind when they were arrested ... [which] were clearly within Tarazon's and Serna's control at the time they were arrested").

- 2) **Extending Beyond the Area of Arrestee's "Immediate Control" in a Home.** The doctrine of search incident to arrest does not ordinarily allow the officer to move the arrestee from place to place inside the home, thereby expanding the area of immediate control that is subject to search. Only when the officer can articulate a reasonable necessity to move the subject or open additional containers will it be reasonable to search additional areas.

- a) **A Law Enforcement Officer May Accompany an Arrestee to Other Areas Within the House.** “The rule of Chimel v. California, 395 U.S. 752 (1969), does not permit the arresting officers to lead the accused from place to place and use his presence in each location to justify a search incident to the arrest.” United States v. Whitten, 706 F.2d 1000, 1016 (9th Cir. 1983), cert. denied, 465 U.S. 1100 (1984). However, where it is necessary to move an arrestee into another room in the house from where the arrest occurred to obtain clothing, a law enforcement officer will be justified in accompanying the arrestee. See Garcia, 376 F.3d at 650 (Noting that “police may follow an arrested suspect wherever he goes, even inside a residence”); Watkins v. United States, 564 F.2d 201, 203 (6th Cir. 1977), cert. denied, 435 U.S. 976 (1978)(Where police “accompanied defendant to the bedroom so that he could get a shirt, and ... noticed the butt of a firearm under the mattress of the bed,” weapons was properly seized incident to arrest). If the officer observes evidence in plain view, it may be seized. This is so even if the decision to move the arrestee was made by a law enforcement officer rather than the arrestee. See, e.g., United States v. Di Stefano, 555 F.2d 1094, 1101 (2d Cir. 1977) (Where arrestee was wearing only a nightgown and bathrobe at the time of arrest, “the officers had a duty to find clothing for Sally to wear or to permit her to do so. Having permitted Sally to retire to her bedroom to dress, Officer Christie was clearly justified in accompanying her to maintain a ‘watchful eye’ on her and to assure that she did not destroy evidence or procure a weapon”); United States v. Titus, 445 F.2d 577, 579 (2d Cir.), cert. denied, 404 U.S. 957 (1971)(Where arrestee was nude, officer’s search of bedroom for clothing was reasonable, and evidence of robbery found in the bedroom was admissible, because “they were bound to find some clothing for Titus rather than take him nude to FBI headquarters on a December night, [and] the fatigue jackets were properly seized under the ‘plain view’ doctrine”); United States v. Butler, 980 F.2d 619, 621 (10th Cir. 1992) (“Several courts have indicated that, even without an express invitation as in Chrisman, police may conduct a limited entry into an area for the purpose of protecting the health or safety of an arrestee”)(citations omitted).

- b) **Arrests Outside a Home Will Not Justify a Search Incident to Arrest Inside.** “Ordinarily, the arrest of a person outside of a residence does not justify a warrantless search of the residence itself.” *United States v. DeBuse*, 289 F.3d 1072, 1075 (8th Cir. 2002)[*citing Chimel v. California*, 395 U.S. 752, 763 (1969)]. See also *Shipley v. California*, 395 U.S. 818, 820 (1965)(“The Constitution has never been construed by this Court to allow the police, in the absence of an emergency, to arrest a person outside his home and then take him inside for the purpose of conducting a warrantless search. On the contrary, ‘it has always been assumed that one’s house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein’”(citation omitted); *James v. Louisiana*, 382 U.S. 36, 37 (1965)(Court held that the search of an arrestee’s home following his arrest on the street two blocks away was not “incident to the arrest”); *Agnello v. United States*, 269 U.S. 20, 32 (1925)(“It has always been assumed that one’s house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein”).
- c) **In Some Situations, a Law Enforcement Officer May Enter a Home Following an Arrest That Occurred Outside.** While the general rule is stated in the preceding paragraph, some circuits have carved out an exception to that rule.

- (1) **Entry Allowed to Obtain Clothing or Identification.** Following the arrest of a person outside a residence, a law enforcement officer may accompany the arrestee "into his residence to obtain clothing or identification." Debus, 289 F.3d at 1075. See, e.g., Washington v. Chrisman, 455 U.S. 1, 7 (1982)(Where arrestee requested to enter residence to obtain identification, Court found officer acted lawfully in accompanying him into his room for the purpose of obtaining identification. "The officer had a right to remain literally at Overdahl's elbow at all times; nothing in the Fourth Amendment is to the contrary"); United States v. Gwinn, 219 F.3d 326, 333 (4th Cir.), cert. denied, 531 U.S. 1025 (2000)(Where arrestee was wearing only blue jeans at the time of his arrest, trooper's reentry to obtain clothing was lawful because "it was the troopers' duty to look after the reasonable safety requirements of persons in their custody." When the police neither manipulate nor use the situation as a pretext to carry out an otherwise impermissible search, the conduct of the police in deciding to dress the suspect is reasonable. United States v. Nascimento, 491 F.3d 25 (1st Cir. 2007). See also United States v. Butler, 980 F.2d 619, 622 (10th Cir. 1992) (Where arrestee had no shoes and officer observed broken glass on the ground, entry into residence to obtain shoes was permissible, because of "the presence of a legitimate and significant threat to the health and safety of the arrestee," and because "there [was] no evidence in the ... record that the concern for the arrestee's health and safety was pretextual").
- (2) **Entry Not Allowed to Obtain Clothing or Identification.** Alternatively, both the Sixth and Ninth Circuits have rejected this exception to the general rule. See United States v. Kinney, 638 F.2d 941, 945 (6th Cir.), cert. denied, 452 U.S. 918 (1981)(Entry was impermissible where "the defendant did not request permission to secure additional clothing and did not consent to an entry of his home"); United States v. Whitten, 706 F.2d 1000, 1016 (9th Cir. 1983), cert. denied, 465 U.S. 1100 (1984)(Entry unlawful absent "a specific request or consent").

- 3) **Containers That are Within an Arrestee's "Immediate Control" May Be Searched Incident to Arrest.** A law enforcement officer may search a container that is within the arrestee's immediate control at the time of the arrest. This could include, for example, an arrestee's wallet, backpack, briefcase, or luggage. See, e.g., United States v. Uricoechea-Casallas, 946 F.2d 162 (1st Cir. 1991) (Wallet); United States v. Tivolacci, 895 F.2d 1423 (D.C. Cir. 1990) (Locked suitcase); United States v. Swann, 149 F.3d 271, 273 (4th Cir. 1998) (Film canister); United States v. Ivy, 973 F.2d 1184, 1187 (5th Cir. 1992) (Briefcase); United States v. Richardson, 121 F.3d 1051, 1056 (7th Cir. 1997) (Shaving bag); United States v. Oakley, 153 F.3d 696, 698 (8th Cir. 1998) (Backpack).
- 4) **"Immediate Control" is Determined at the Time of Arrest, Not the Time of Search.** The area to be searched incident to a lawful arrest is that area under the arrestee's immediate control at the time of the arrest, not the time of the search. For example, in In Re Sealed Case 96-3167, 153 F.3d 759 (D.C. Cir. 1998), the defendant was convicted of drugs and weapons charges based upon evidence uncovered during a search incident to arrest of a bedroom. Although the defendant had been arrested in the bedroom, he challenged the legality of the search, claiming that, "although the ... bedroom was the room in which he had been arrested ... he was at the bottom of the stairs by the time the bedroom was searched. By that time, the large bedroom was no longer under his "immediate control." Id. at 767 (footnote omitted). The court rejected this argument, finding that "the critical time for analysis is the time of the arrest and not the time of the search." Id. Thus, "the area under a defendant's 'immediate control' for Chimel purposes must be examined as of the time the arrest occurs." See also Abdul-Saboor, 85 F.3d at 668 ("The determination of immediate control must be made when the arrest occurs"); United States v. Hudson, 100 F.3d 1409, 1419 (9th Cir. 1996) (Search incident to arrest "may be conducted shortly after the arrestee has been removed from the area, provided that (1) the search is restricted to the area that was 'within the arrestee's immediate control when he was arrested,' and (2) events occurring after the arrest but before the search incident to arrest did not render the search unreasonable")(citations omitted).

6. *** Vehicles and Searches Incident to Arrest: Basis. *Arizona v. Gant* Has Redefined the Basis of Searching a Vehicle Incident to the Arrest of One of the Vehicle's Occupants. *Arizona v. Gant*, 129 S. Ct. 1710, 2009 U.S. LEXIS 3120 (2009), rejected the bright-line interpretation of *New York v. Belton*, 453 U.S. 454 (1981). That interpretation [formerly taught at FLETC by LGD] was that the search of a passenger compartment of a vehicle was an automatic incident of the arrest of one of its occupants. *Gant* has: [1] "re-tethered" such searches to *Chimel*'s original justification for searches incident to arrest; and [2] added a new basis for such searches borrowed from Justice Scalia's concurrence in *Thornton*. Once the basic requirements for a search incident to arrest have been met, *Gant* holds: "Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." Prudent police arrest procedures virtually eliminate the first justification. So far, case law has not fleshed-out the second justification with any precision. Here are some observations that may be helpful for informal classroom discussions until authoritative case-law guidance emerges:

- 1) **The *Gant* Holding Renews the Importance of Recognizing and Exploiting Other Valid Bases to Search a Vehicle Without a Warrant.** Vehicle frisks, the *Carroll* Doctrine, vehicle inventories, consent searches, vehicle inspections and exigent circumstances are unaffected by *Gant*.
- 2) **The Phrase "Reasonable to Believe" Is Ill-Defined in the *Gant* Context.** It is unlikely that the phrase equates to probable cause—probable cause that evidence of any crime is in a vehicle is already covered by *Carroll*. It is unlikely that the phrase equates to reasonable suspicion—if that had been the majority's meaning, wouldn't they have just said so? It is distinctly possible that the Court meant to be imprecise. Compare the inconsistencies between the Court's two articulations of its holding: "[W]e also conclude that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that *evidence* of the offense of arrest *might be found in the vehicle*," with "it is reasonable to believe the *vehicle contains evidence* of the offense of arrest," [emphasis added].
- 3) **The *Gant* Holding Rewards LEO Who Identify and Document All Offenses for which LEO Have Probable Cause to Arrest a Suspect.** The offense resulting from six small bags of drugs found in a driver's pocket following his arrest on a twenty-year-old murder warrant are minor compared to his earlier homicide. But the drug offense would justify a vehicle search more clearly than the homicide.

- 4) **Future Cases May Use Gant's Rationale to Limit Searches Incident to Arrest in Other Contexts Beside Vehicle Searches.**
The logic of the Gant majority would seem to preclude returning to search the place of arrest in the arrestee's home once the arrestee is secured and removed.

d. Vehicles and Searches Incident to Arrest: Scope. The Passenger Compartment of a Vehicle May Be Searched Incident to the Arrest of an Occupant. Chimel established that a search incident to arrest may be conducted on the arrestee's person and those areas "within the immediate control of the arrestee" at the time of the arrest. In Belton, supra, the Supreme Court established the following bright-line rule for vehicles: "When a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." Id. at 460. This "bright-line" rule was redefined by Gant which added additional requirements to justify the search of a vehicle incident to the arrest of one of its occupants. These are discussed above. The Gant majority declined to overrule Belton, however, and left Belton's delineation of the scope of a search of a vehicle incident to the arrest of one of its occupants undisturbed.

- 1) **The Phrase "Passenger Compartment" Has Been Defined Broadly By the Courts.** "Courts have interpreted the 'passenger compartment' requirement broadly in order to effectuate its purpose of protecting police officers and citizens from defendants reaching for a weapon or destroying evidence." United States v. Veras, 51 F.3d 1365, 1371 (7th Cir.), cert. denied, 516 U.S. 999 (1995). Generally speaking, this means that "areas reachable by an occupant without exiting the automobile may be searched incident to arrest, but an area that is outside any occupant's reach or that could be reached only through an elaborate dismantling of the vehicle may not be searched." United States v. Barnes, 374 F.3d 601, 604 (8th Cir. 2004). Of course, "[t]he lawfulness of the search does not depend on whether the occupant was *actually capable* of reaching the area during the course of the police encounter. ... As long as an occupant could have reached an area while inside the vehicle, then the police may search that area incident to a lawful arrest." Id. at 604(emphasis in original). In light of this broad interpretation, courts have upheld searches of the following areas as part of the "passenger compartment" of the vehicle:

- a) **Hatchbacks.** *United States v. Mayo*, 394 F.3d 1271 (9th Cir. 2005), cert. denied 125 S.Ct 1749 (hatchback is part of the passenger compartment); *United States v. Caldwell*, 97 F.3d 1063, 1067 (8th Cir. 1996) (“Following appellant’s arrest, the police could lawfully search the passenger compartment of the car, including the hatchback portion of the car”); *United States v. Doward*, 41 F.3d 789, 794 (1st Cir. 1994), cert. denied, 514 U.S. 1074 (1995)(In finding search of hatchback permissible, court noted that “Belton ummistakably foreclose[d] ... inquiries on actual ‘reachability,’” thus the only question that must be addressed in these situations is whether “the area to be searched is generally reachable without exiting the vehicle, without regard to the likelihood in the particular case that such a reaching was possible”)(internal quotation marks and citation omitted); *United States v. Russell*, 670 F.2d 323, 327 (D.C. Cir.), cert. denied, 457 U.S. 1108 (1982) (Holding that “a hatchback reachable without exiting the vehicle properly ranks as part of the interior or passenger compartment”); *United States v. Rojo-Alvarez*, 944 F.2d 959, 970 (1st Cir. 1991)(Court found the search of a hatch area lawful under Belton because the hatch area was “within the defendant’s reach”);
- b) **Interior of a Van.** *United States v. Green*, 178 F.3d 1099 (10th Cir. 1999) (entire interior of van is part of passenger compartment); *United States v. Lacey*, 86 F.3d 956 (10th Cir.), cert. denied, 519 U.S. 944 (1996) (same); *United States v. Green*, 178 F.3d 1099 (10th Cir. 1999) (same);

- c) **Cargo Area of an SUV or Station Wagon.** United States v. Olguin-Rivera, 168 F.3d 1203, 1204 (10th Cir. 1999) (Holding that “officers may search the entire passenger compartment, including the interior cargo or luggage area, of sport-utility vehicles or similarly configured automobiles, whether covered or uncovered,” and basing its finding in part on the fact that “trunks are inaccessible from the passenger compartment, whereas the cargo area in the vehicle in this case, whether covered or not, [was] still accessible to the vehicle’s occupants”); see also United States v. Pino, 855 F.2d 357 (6th Cir. 1988) (cargo area of a station wagon is part of passenger compartment); and United States v. Henning, 906 F.2d 1392 (10th Cir. 1990), cert. denied, 498 U.S. 1069 (1991), a full search of the interior of a Chevrolet Suburban was found to be Constitutional under Belton. According to the court, “where ... the vehicle contains no trunk, the entire inside of the vehicle constitutes the passenger compartment and may be lawfully searched.” Id. at 1396.
 - d) **Trunk Accessible by Fold Down Seats or Armrest.** United States v. Arnold, 388 F.3d 237 (7th Cir. 2004) (back seat armrest access to trunk made trunk accessible as part of passenger compartment);
 - e) **Space Behind a Radio or Heating Vent in a Dashboard,** United States v. Willis, 37 F.3d 313, 316 (7th Cir. 1994); United States v. Patrick, 3 F. Supp. 2d 95, 99 (D. Mass 1998);
 - f) **Secret Compartment in the Backseat of the Vehicle,** Veras, 51 F.3d at 1372; United States v. Poggemiller, 375 F.3d 686, 688 (8th Cir. 2004);
 - g) **Inside Bicycle Handlebars,** United States v. Currence, 446 F. 3d 554 (4th Cir. 2006).
- e. **Containers Located in a Vehicle May Be Searched Incident to the Arrest of an Occupant.** In Belton, the Supreme Court additionally held that “the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach.” Belton, 453 U.S. at 460 (citation and footnote omitted).

- 1) **The Definition of a “Container.”** A “container” was defined as “any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like.” Belton, 453 U.S. at 461 n.4.
- 2) **Based on Case Law, a Locked Container in a Vehicle Can Probably Be Searched Incident to the Arrest of an Occupant.**
While this definition does not expressly address “locked” containers, several subsequent federal cases can be interpreted as including locked containers within the scope of a lawful search incident to arrest. See Knowles, 525 U.S. at 118 (Law enforcement officers may “even conduct a full search of the passenger compartment, including *any* containers therein, pursuant to a custodial arrest”)(emphasis added); United States v. Tavalacci, 895 F.2d 1423, 1428 (D.C. Cir. 1990)(locked bag); United States v. Gonzalez, 71 F.3d 819, 825-26 (11th Cir. 1996)(Belton rule allowed searches of glove boxes, locked or unlocked); United States v. Valiant, 873 F.2d 205, 206 (8th Cir. 1989)(locked briefcase was closed container within the vehicle that could be lawfully searched incident to arrest); United States v. Woody, 55 F.3d 1257, 1269-70 (7th Cir. 1995)(search of locked glove box reasonable during search incident to arrest). Further, two of the Justices who disagreed with the majority’s decision in Belton seemed to concede that locked containers fall within the parameters outlined in that case. Belton, 453 U.S. at 469 (Brennan, J., dissenting)(Noting that result in Belton would have been the same even if “search had extended to locked luggage or other inaccessible containers located in the back seat of the car”); Id. at 453 U.S. 472 (White, J., dissenting)(Belton rule allows “interior of the car and any container found therein, whether locked or not” to be searched incident to lawful arrest).

- f. **The Trunk of a Vehicle May Not Be Searched Incident to the Arrest of an Occupant.** The trunk of a vehicle, however, is not within the immediate control of an arrestee and cannot be searched during a search incident to arrest. Belton, 453 U.S. at 461 n.4 (“Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk”). See also United States v. Thompson, 906 F.2d 1292, 1298 (8th Cir.), cert. denied, 498 U.S. 989 (1990); United States v. Hernandez, 901 F.2d 1217, 1220 (5th Cir. 1990); United States v. Schechter, 717 F.2d 864, 868 (3rd Cir. 1983); United States v. Freire, 710 F.2d 1515, 1521 (11th Cir. 1983), cert. denied, 465 U.S. 1023 (1984); United States v. Wright, 932 F.2d 868, 878 (10th Cir. 1991). *** This may not remain the case under Gant if the search is justified on the basis that it is reasonable to believe that evidence of the crime of arrest could be in the trunk. No case law to date, however, supports this extension of such searches to the trunk of a vehicle.
- g. **When a Recent Occupant of a Vehicle is Arrested, Police May Typically Search the Vehicle Incident to Arrest.**
- 1) In Thornton v. United States, 541 U.S. 615 (2004), the Supreme Court addressed whether the rule of Belton, discussed above, “is limited to situations where the officer makes contact with the occupant while the occupant is inside the vehicle, or whether it applies as well when the officer first makes contact with the arrestee after the latter has stepped out of his vehicle.” Id. at 619. In finding “no basis to conclude that the span of the area generally within the arrestee’s immediate control is determined by whether the arrestee exited the vehicle at the officer’s direction, or whether the officer initiated contact with him while he remained in the car,” id. at 620-21, the Court noted that, “[i]n all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle.” Id. at 621. Further, “[i]n either case, the officer faces a highly volatile situation,” id., and, stated the Court, it “would make little sense to apply two different rules to what is, at bottom, the same situation.” Id. In fact, the Court suggested that “[i]n some circumstances it may be safer and more effective for officers to conceal their presence from a suspect until he has left his vehicle.” Id.
 - 2) For those reasons, the Court held that “[s]o long as an arrestee is ... [a] ‘recent occupant’ of a vehicle ... officers may search that vehicle incident to the arrest.” Id. at 623-24. See also United States v. Herndon, 393 F.3d 665, 668 (6th Cir. 2005) (Search of truck permissible under Thornton “recent occupant” theory because “when the police approached Herndon, the door of his truck was still open and he was standing only a few feet away.”

V. **EPO #22: IDENTIFY CIRCUMSTANCES WHERE A SUSPECT'S CONSENT TO SEARCH IS VOLUNTARY**

1. **General Rule – Consent Searches are an Exception to the Warrant Requirement.** “It is ... well-settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.” Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973)(citation omitted). *See also* United States v. Rodriguez, 367 F.3d 1019, 1027 (8th Cir. 2004)(“The Fourth Amendment’s general prohibition against warrantless searches does not apply when officers obtain a voluntary consent from the person whose property is searched or from a third party with common authority over the property”)(citation omitted); United States v. Ringold, 335 F.3d 1168, 1174 (10th Cir.), cert. denied, 540 U.S. 1026 (2003)(“It has long been established that an officer may conduct a warrantless search consistent with the Fourth Amendment if the challenging party has previously given his or her voluntary consent to that search”).
2. **Neither Probable Cause Nor Reasonable Suspicion is Required for a Consent Search.** When a law enforcement officer obtains valid consent to search a given area or object, neither reasonable suspicion, nor probable cause, is required. Thus, “in situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by valid consent may be the only means of obtaining important and reliable evidence.” Schneckloth, 412 U.S. at 227. *See also* United States v. Del Rosario, 388 F.3d 1, 13 (1st Cir. 2004) (“At the risk of belaboring the obvious, a supportable finding of consent eliminates the need for either a search warrant or probable cause”).
3. **Consent Searches Have Two Requirements.** Generally speaking, there are two (2) requirements for a consent search to be valid.
 - a. **Voluntary.** First, the consent to search must be voluntarily given. *See, e.g.,* United States v. Bernitt, 392 F.3d 873, 876 (7th Cir. 2004)(citation omitted)(noting that, “the consent to a police search must be voluntary”).
 - b. **Actual or Apparent Authority.** Second, the consent must be given by an individual with either actual or apparent authority over the place to be searched. **This second requirement will be discussed in detail in EPO # 23.**
4. **The First Element of a Valid Consent Search is That the Consent Be Given Voluntarily.** Both “the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force.” Schneckloth, 412 U.S. at 228. To say that consent was given “voluntarily” means the consent “was not the product of duress or coercion, express or implied” Bernitt, 392 F.3d at 876 (citation omitted). In making this determination, courts will look at the “totality of the circumstances” surrounding the giving of the consent, because “it is only by analyzing all the circumstances of an individual consent that it can be ascertained whether in fact it was voluntary or coerced.” Id. at 233.

- a. **Courts Consider Numerous Factors in Deciding Whether Consent was Voluntarily Given.** Factors to consider in making a voluntariness determination include, but are not limited to:

- 1) **The Age, Education, and Intelligence of the Individual**, *Id.* at 226; *United States v. Asibor*, 109 F.3d 1023, 1038 n.14 (5th Cir.), *cert. denied*, 522 U.S. 902 (1997); *United States v. Smith*, 260 F.3d 922, 924 (8th Cir. 2001); *United States v. Givan*, 320 F.3d 452, 459 (3d Cir. 2003)(Noting “the critical factors comprising a totality of the circumstances inquiry ... include[e] ... the age, intelligence, and educational background of the consenting individual”); *United States v. Ivy*, 165 F.3d 397, 402 (6th Cir. 1998); *United States v. Lattimore*, 87 F.3d 647, 650 (4th Cir. 1996); *United States v. Taylor*, 196 F.3d 854, 860 (7th Cir. 1999), *cert. denied*, 529 U.S. 1081 (2000); *United States v. Blake*, 888 F.2d 795, 798 (11th Cir. 1989).
- 2) **The Individual’s Knowledge of His or Her Right to Refuse to Give Consent**, *Schneckloth*, 412 U.S. at 227 (“While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent”)(emphasis in original); *United States v. Watson*, 423 U.S. 411, 424 (1976)(Noting “the absence of proof that [the suspect] knew he could withhold his consent, though it may be a factor in the overall judgment, is not to be given controlling significance”); *Asibor*, 109 F.3d at 1038 n.14; *United States v. Perez*, 72 Fed. Appx. 857, 859 (2d Cir. 2003) (unpublished) (Noting that, “although the knowledge of the right to refuse consent may be a factor in considering whether consent is voluntary ... failure to inform a suspect of his rights does not automatically render a consent involuntary”); *United States v. Jones*, 286 F.3d 1146, 1152 (9th Cir. 2002); *Ivy*, 165 F.3d at 402; *Blake*, 888 F.2d at 798.
- 3) **The Length of the Detention**, *Schneckloth*, 412 U.S. at 226; *Smith*, 260 F.3d at 924 (Factors to consider include “the length of time [the suspect] was detained”); *Hubbard v. Haley*, 317 F.3d 1245, 1253 (11th Cir. 2003); *Ivy*, 165 F.3d at 402; *Lattimore*, 87 F.3d at 650; *Taylor*, 196 F.3d at 860.
- 4) **The Repeated and Prolonged Nature of the Questioning**, *Schneckloth*, 412 U.S. at 226; *Hubbard*, 317 F.3d at 1253.
- 5) **Whether the Consent was Given in Writing**, *Navarro*, 90 F.3d at 1257; *United States v. Boone*, 245 F.3d 352, 362 (4th Cir.), *cert. denied*, 532 U.S. 1031 (2001)(“Written consent supports a finding that the consent was voluntary”).

- 6) **The Use of Physical Punishment, Such as Deprivation of Food or Sleep**, Schneckloth, 412 U.S. at 226; Watson, 423 U.S. at 424 (Consent upheld because, *inter alia*, “[t]here was no overt act or threat of force against [the suspect] proved or claimed”); Smith, 260 F.3d at 924 (Factors to consider include “whether the police threatened, physically intimidated, or punished [the suspect]”); Hubbard, 317 F.3d at 1253; Ivy, 165 F.3d at 402.
- 7) **Whether the Individual Cooperated in the Search**, United States v. Carrate, 122 F.3d 666, 670 (8th Cir. 1997)(Suspect “idly stood by while the troopers searched his car, never indicating that he objected to the search”) and United States v. McSween, 53 F.3d 684, 688 (5th Cir.), cert. denied, 516 U.S. 874 (1995)(Defendant voluntarily consented to search where he assisted officers through removal of paneling in hatchback); Givan, 320 F.3d at 459 (Noting “the critical factors comprising a totality of the circumstances inquiry ... include[e] ... the parties’ verbal and non-verbal actions ...”); Blake, 888 F.2d at 798.
- 8) **Whether the Suspect was in Custody at the Time the Consent was Given**, Watson, 423 U.S. at 424 (While noting that custody is a factor to be considered, Court emphasized that “the fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search”); see also United States v. Renken, 474 F.3d 984 (7th Cir. 2007) (consent to search can be voluntarily given even when a defendant is in custody without having received Miranda warnings. Custody alone has never been enough in itself to demonstrate a coerced confession or consent to search); Smith, 260 F.3d at 924 (One factor to consider was “whether [the suspect] was in custody or under arrest when the consent was given”); Asibor, 109 F.3d at 1038 n.14; Jones, 286 F.3d at 1152; Taylor, 196 F.3d at 860; Blake, 888 F.2d at 798.

NOTE: It should be remembered that “[c]onsent given during an illegal detention is presumptively invalid.” United States v. Cellitti, 387 F.3d 618, 622 (7th Cir. 2004). However, “the consent may nevertheless be valid provided that it is sufficiently attenuated from the illegal police action to dissipate the taint.” Id. at *10.

- 9) **The Suspect’s Belief That No Incriminating Evidence Will Be Found**, Asibor, 109 F.3d at 1038 n.14; Blake, 888 F.2d at 798.

- 10) **The Presence of Coercive Police Procedures, Such as Displaying Weapons or Using Force**, Orhorhaghe v. Immigration and Naturalization Service, 38 F.3d 488, 500 (9th Cir. 1994); Asibor, 109 F.3d at 1038 n.14.; Taylor, 196 F.3d at 860; Blake, 888 F.2d at 798.
- 11) **The Suspect's Experience in Dealing With Law Enforcement Officers**, Watson, 423 U.S. at 424-25 (Consent upheld in part because "[t]here [was] no indication in this record that [the suspect] was a newcomer to the law"); Smith, 260 F.3d at 924 (Factors to consider include "whether [the suspect] had experienced prior arrests and was thus aware of the protections that the legal system affords to suspected criminals"); Lattimore, 87 F.3d at 650; United States v. Barnett, 989 F.2d 546, 556 (1st Cir. 1993)(defendant had eighteen prior arrests).
- 12) **Whether the Suspect was Under the Influence of Any Drugs or Alcohol**, Smith, 260 F.3d at 924.
- 13) **Whether the Suspect was Notified of his Miranda Rights**, Watson, 423 U.S. at 425; Smith, 260 F.3d at 924; Jones, 286 F.3d at 1152; Taylor, 196 F.3d at 860.
- 14) **Whether the Police Made Promises or Misrepresentations**, Watson, 423 U.S. at 424 (Suspect's consent upheld because, *inter alia*, "[t]here were no promises made to him and no indication of more subtle forms of coercion that might flaw his judgment"); Smith, 260 F.3d at 924; Hubbard, 317 F.3d at 1253; Ivy, 165 F.3d at 402; Hadley v. Williams, 368 F.3d 747, 749 (7th Cir. 2004)(In finding consent obtained based upon a lie regarding the existence of an arrest warrant, court noted that, "[a]lthough 'the law permits the police to pressure and cajole, conceal material facts, and actively mislead,' it draws the line at outright fraud").
- 15) **The Location Where the Consent was Given**, Watson, 423 U.S. at 424 (Suspect's consent found valid in part because "consent was given while on a public street, not in the confines of the police station"); Smith, 260 F.3d at 924 (Factors to consider include "whether the consent occurred in a public or a secluded place"); Givan, 320 F.3d at 459 (Noting "the critical factors comprising a totality of the circumstances inquiry ... include[e] ing the setting in which the consent was obtained ..."); Lattimore, 87 F.3d at 650.

- 16) **Whether the Defendant Had Been Told a Search Warrant Could Be Obtained**, Jones, 286 F.3d at 1152. In such situations, application of this factor “hinges on whether a suspect is informed about the possibility of a search warrant in a threatening manner.” United States v. Soriano, 346 F.3d 963, 971 (9th Cir. 2003)[*citing* United States v. Cormier, 220 F.3d 1103, 1112 (9th Cir. 2000), *cert. denied*, 531 U.S. 1174 (2001)]. However, “when probable cause to justify a warrant exists, the weight of [this] ... factor is significantly diminished.” Soriano, 346 F.3d at 971.
- 17) **Whether There Were Repeated Requests for Consent**, Taylor, 196 F.3d at 860. *But see* United States v. Jones, 254 F.3d 692, 696 (8th Cir. 2001)(Noting “there is certainly no legal rule that asking more than once for permission to search renders a suspect’s consent involuntary, particularly where the suspect’s initial response is ambiguous”).
- b. **Acquiescence to Law Enforcement Will Result in Consent Being Found Involuntary.** “There can be no effective consent to a search or seizure if that consent follows a law enforcement officer’s assertion of an independent right to engage in such conduct.” Orhorhaghe v. Immigration and Naturalization Service, 38 F.3d 488, 500 (9th Cir. 1994); *see also* Bumper v. North Carolina, 391 U.S. 543 (1968). For example, when an individual gives consent for a search only after a law enforcement officer asserts that he or she has a warrant, the consent is not truly being given voluntarily, in that the officer is “announcing in effect that the [individual] has no right to resist the search.” Bumper, 391 U.S. at 550. In Orhorhaghe, the court found the suspect’s consent had not been voluntarily given because, among other things, a law enforcement officer had informed him “he (the officer) didn’t need a warrant.” This statement on the part of the law enforcement officer “constituted ... an implied claim of a right to conduct the search.” *Id.* at 501. *See also* United States v. Cedano-Medina, 366 F.3d 682, 684 (8th Cir. 2004)(Burden of proving consent is on government, and such burden “is not satisfied by showing a mere submission to a claim of lawful authority”)[*quoting* United States v. \$ 404,905.00, 182 F.3d 643, 649 n.3 (8th Cir. 1999)].
- c. **The Burden of Proving Consent was Voluntarily Given Rests With the Government.** The burden of proving that the consent was voluntarily given rests with the prosecutor, and “cannot be discharged by showing no more than acquiescence to a claim of lawful authority.” Bumper, 391 U.S. at 550.

5. **Consent May Be Inferred From a Defendant's Words or Actions.** Consent may be expressly sought from and given by a defendant. However, consent may also be inferred from a defendant's words or actions, so long as they are sufficiently comprehensible to a reasonable officer. United States v. Hylton, 349 F.3d 781, 786 (4th Cir. 2003); United States v. Guerrero, 472 F.3d 784 (10th Cir. 2007) (a defendant's consent must be clear, but it need not be verbal). *See also* Jones, 254 F.3d at 695 ("Consent can be inferred from words, gestures, and other conduct"); United States v. Carter, 378 F.3d 584, 587 (6th Cir. 2004)(Same); United States v. Wesela, 223 F.3d 656, 661 (7th Cir. 2000), cert. denied, 531 U.S. 1174 (2001)("The fact that there was no direct verbal exchange between [the officer and the third party] in which [the third party] explicitly said 'it's o.k. with me for you to search the apartment,' is immaterial, as the events indicate her implicit consent"); United States v. Buettner-Janusch, 646 F.2d 759, 764 (2d Cir.), cert. denied, 454 U.S. 830 (1981) ("Moreover, it is well settled that consent may be inferred from an individual's words, gestures, or conduct").

NOTE: An example of how an individual's consent may be inferred from their gestures or conduct is presented in United States v. Carter, 378 F.3d 584 (6th Cir. 2004). Here, uniformed police officers knocked on a defendant's hotel room door. When the defendant answered the door, the officers asked for permission to enter. At that point, the defendant "stepped back and cleared a path for the officers to enter." *Id.* at 587. According to the court, "[a]ny ordinary caller, under like circumstances, would understand assent to have been given, and the police are not held to a higher standard in this regard than an ordinary person." *Id.* at 588. *See also* Robbins v. MacKenzie, 364 F.2d 45, 49 (1st Cir.), cert. denied, 385 U.S. 913 (1966)("An ordinary person who knocks on a door and receives assent may properly consider himself an invited guest Similarly, the Fourth Amendment ... does not require [a police officer] to be clairvoyant").

6. **Miranda Rights Are Not Required Before Seeking Consent.** If a suspect is under arrest, there is no requirement that law enforcement officers notify the individual of his or her Miranda rights prior to requesting consent, even if the individual has previously invoked his right to silence or right to counsel. "A consent to search is not the type of incriminating statement toward which the Fifth Amendment is directed. It is not in itself 'evidence of a testimonial or communicative nature.'" United States v. Lemon, 550 F.2d 467, 472 (9th Cir. 1977). *See also* United States v. Lee, 356 F.3d 831, 834 (8th Cir. 2003)("Miranda warnings, however, are not required for consent to a search to be voluntary, although they can lessen the probability that a defendant was subtly coerced"); United States v. McClellan, 165 F.3d 535, 544 (7th Cir.), *cert. denied*, 526 U.S. 1125 (1999)(Noting that "consent to search is not an interrogation within the meaning of Miranda," so warnings not required before seeking consent even after suspect had previously invoked his right to counsel); United States v. Knight, 58 F.3d 393, 397 (8th Cir. 1995), *cert. denied*, 516 U.S. 1099 (1996)(Holding "the Fifth Amendment's protection against self-incriminating statements may limit further interrogation once a person in custody invokes his right to counsel, but there is no similar prohibition on securing a voluntary consent to search for physical evidence"); Cody v. Solem, 755 F.2d 1323, 1330 (8th Cir.), *cert. denied*, 474 U.S. 833 (1985) ("Simply put, a consent to search is not an incriminating statement"); Smith v. Wainwright, 581 F.2d 1149, 1152 (5th Cir. 1978)("A consent to search is not a self-incriminating statement"); United States v. Faruolo, 506 F.2d 490, 495 (2d Cir. 1974)("There is no possible violation of Fifth Amendment rights since consent to search is not 'evidence of a testimonial or communicative nature.'"). *But see* United States v. Fleming, 31 F. Supp. 2d 3, 5 (D.D.C. 1998)(Holding consent to search invalid since it was given after suspect invoked his right to counsel)

W. EPO #23: IDENTIFY THE CIRCUMSTANCES IN WHICH A THIRD PARTY HAS THE ACTUAL OR APPARENT AUTHORITY TO GRANT CONSENT TO SEARCH A SUSPECT'S PROPERTY

1. **The Second Requirement of a Valid Consent Search is That the Consent Be Given By Someone With Actual or Apparent Authority.** The second requirement for a consent search is that the consent must be given by an individual with either actual or apparent authority over the place to be searched. *See, e.g.,* Kimoana, 383 F.3d at 1221 ("A third party's consent to search is valid if that person has either the 'actual authority' or the 'apparent authority' to consent to a search of that property"); United States v. James, 353 F.3d 606, 613 (8th Cir. 2003)("Consent to search ... may be given either by the suspect or by some other person who has common authority over, or sufficient relationship to, the item to be searched").
- a. **An Individual Who Actually Owns or Controls An Item Has "Actual" Authority to Consent to a Search.** "Actual" authority may be obtained "from the individual whose property is searched." Illinois v. Rodriguez, 497 U.S. 177, 181 (1990)(citation omitted).

- b. **An Third Party Who Has Common Authority Over an Item or Area May Consent to a Search.** Additionally, consent to search may be given by a third party “who possesses common authority over or other sufficient relationship to the ... effects sought to be inspected.” United States v. Matlock, 415 U.S. 164, 171 (1974). “[A] third party has authority to consent to a search of a home when that person (1) has access to the area searched and (2) has either (a) common authority over the area, (b) a substantial interest in the area, or (c) permission to gain access to the area. Moore v. Andreno, 505 F.3d 203, 208-09 (2nd Cir. 2007).

As noted by the Supreme Court in Matlock:

“Common authority is, of course, not to be implied from the mere property interest a third-party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements ..., but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.” Id. at 172 n.7.

Indicators of common authority include “(1) possession of a key to the premises; (2) a person’s admission that she lives at the residence in question; (3) possession of a driver’s license listing the residence as the driver’s legal address; (4) receiving mail and bills at that residence; (5) keeping clothing at the residence; (6) having one’s children reside at that address; (7) keeping personal belongings such as a diary or pet at that residence; (8) performing household chores at that residence; (9) being on the lease for the premises and/or paying rent; and (10) being allowed into the resident when the owner is not present.” United States v. Groves, 470 F.3d 311, 319 (7th Cir. 2006) (internal citations omitted). *See also* James, 353 F.3d at 613 (“Common authority is a function of mutual use, joint access, and control ...”); Kimoana, 383 F.3d at 1222 (Third party consent to search motel room upheld where, “[a]lthough Defendant was not the registered guest who had paid for the room, he had stayed there overnight, left his possessions there, and carried a key to the room”); United States v. Davis, 332 F.3d 1163, 1169 (9th Cir. 2003) (“A third party has actual authority to consent to a search of a container if the owner of the container has expressly authorized the third party to give consent or if the third party has mutual use of the container and joint access to or control over the container”); United States v. Rith, 164 F.3d 1323, 1329 (10th Cir.), cert. denied, 528 U.S. 827 (1999) (Noting “a third party has authority to consent to a search of property if that third party has either (1) mutual use of the property by virtue of joint access, or (2) control for most purposes over it”); United States v. Aghedo, 159 F.3d 308, 310 (7th Cir. 1998) (“Common authority is based upon mutual use of property by persons generally having joint access or control”).

- c. **An Individual Whom the Police Reasonably, Albeit Mistakenly, Believe Has Authority to Consent May Have “Apparent” Authority.** Consent may also be obtained from an individual who has “apparent” authority over the place or item to be searched. This typically occurs when law enforcement officers conduct a warrantless search of an object based upon the consent of a third-party whom the officers, at the time of the search, reasonably, albeit erroneously, believed possessed common authority over the object. Rodriguez, 497 U.S. at 186. If the officers’ belief is “reasonable,” considering all of the facts available to them at the time the search is conducted, the search will still be valid. *See also* Cedano-Medina, 366 F.3d at 684-85 (Noting “a person can render a search legal by behaving in a way that could cause a reasonable person to believe that he or she has knowingly and voluntarily consented, whether or not the person actually intends to consent”); United States v. Sanchez, 156 F.3d 875, 878 (8th Cir. 1998)(“Finally, whether or not the suspect has actually consented to a search, the Fourth Amendment requires only that the police reasonably believe the search to be consensual”); United States v. Jenkins, 92 F.3d 430, 436 (6th Cir. 1996), cert. denied, 520 U.S. 1170 (1997)(“When one person consents to a search of the property owned by another, the consent is valid if ‘the facts available to the officer at the moment ... warrant a man of reasonable caution in the belief that the consenting party had authority over the premises’”(citation omitted); United States v. Elliott, 50 F.3d 180, 187 (2d Cir. 1995), cert. denied, 516 U.S. 1050 (1996); United States v. Saadeh, 61 F.3d 510, 517-518 (7th Cir.), cert. denied, 516 U.S. 990 (1995).
- d. **Property Ownership is Not Dispositive in Determining Who Has Consent to Search.** As note above, the Supreme Court has “expressly downplayed the significance of property ownership when deciding whether a third party possessed common authority to consent.” United States v. Shelton, 337 F.3d 529, 532 n.11 (5th Cir. 2003).

2. **The Scope of a Consent Search is Generally Defined by the Consent Given.** “Warrantless searches may not exceed the scope of the consent given.” United States v. Marshall, 348 F.3d 281, 286 (1st Cir. 2003). “The scope of a search is generally defined by its expressed object.” Florida v. Jimeno, 500 U.S. 248, 251 (1991)[*citing* United States v. Ross, 456 U.S. 798 (1982)]. “The standard for measuring the scope of a suspect’s consent under the Fourth Amendment is that of ‘objective’ reasonableness – what would the typical reasonable person have understood by the exchange between the officer and the suspect?” Jimeno, 500 U.S. at 251(citations omitted). In answering this questions, courts “look beyond the language of the consent itself, to the overall context, which necessarily encompasses contemporaneous police statements and actions.” United States v. Melendez, 301 F.3d 27, 32 (1st Cir. 2002)(citation omitted). See, e.g., Hadley, 368 F.3d at 750 (“The fact that a person answers a knock at the door doesn’t mean that he agrees to let the person who knocked enter,” nor does telling someone to “answer the door” “necessarily mean that you’re telling him to let the person in”)[*citing* Spring v. Village of Olympia Fields, 266 F.3d 684, 688-90 (7th Cir. 2001); United States v. Berkowitz, 927 F.2d 1376, 1387 (7th Cir.), cert. denied, 502 U.S. 845 (1991); United States v. McCraw, 920 F.2d 224, 229-30 (4th Cir. 1990)].

NOTE: In situations involving requests to search vehicles, “[a] general grant of permission to search an automobile typically extends to the entire car, absent an objection or an explicit limitation by the grantee.” United States v. Rosborough, 366 F.3d 1145, 1150 (10th Cir. 2004). See also United States v. Zapata, 180 F.3d 1237, 1243 (11th Cir. 1999) (“A general consent to search for specific items includes consent to search any compartment or container that might reasonably contain those items”); United States v. Ferrer-Montoya, 483 F.3d 565 (8th Cir. 2007) (same).

- a. **An Individual May Limit the Scope of Any Consent Given.** An individual may limit the scope of any consent. Jimeno, 500 U.S. at 252 (“A suspect may of course delimit as he chooses the scope of the search to which he consents”). See also Walter v. United States, 447 U.S. 649, 656 (1980)(plurality opinion)(“When an official search is properly authorized – whether by consent or by issuance of a valid warrant – the scope of the search is limited by the terms of its authorization”); Marshall, 348 F.3d at 287 (“For sure, a consenting party may limit the scope of his or her consent or withdraw it altogether”); United States v. Jones, 356 F.3d 529, 534 (4th Cir. 2004)(“The suspect may impose limits on the items or areas subject to the consent search, just as he may refuse to allow any search whatsoever in the absence of a warrant”). Should a law enforcement officer fail to comply with the limitations placed on the consent, “the search is impermissible.” United States v. Strickland, 902 F.2d 937, 941 (11th Cir. 1990).

- b. **An Individual May Revoke Any Consent Given.** An individual may also revoke his or her consent. When consent is revoked, a law enforcement officer is required to cease searching, unless another exception to the Fourth Amendment's warrant requirement (e.g., probable cause to search a vehicle) is present. See United States v. Fuentes, 105 F.3d 487, 489 (9th Cir. 1997) (Suspect effectively revoked consent by shouting "No, wait" before officer could pull cocaine out of pocket); United States v. Martel-Martines, 988 F.2d 855, 858 (8th Cir. 1993) ("Though consent may be withdrawn, Martel-Martinez's passive conduct fell far short of the 'unequivocal act or statement of withdrawal' required"). In fact, an individual's failure to limit the scope of a search may defeat a later claim that the search exceeded the scope of the consent given. See generally United States v. Gordon, 173 F.3d 761, 766 (10th Cir.), cert. denied, 528 U.S. 886 (1999) ("We consistently and repeatedly have held a defendant's failure to limit the scope of a general authorization to search, and failure to object when the search exceeds what he later claims was a more limited consent, is an indication the search was within the scope of consent").
- c. **The Scope of a Consent Search May Be Expanded Through the Suspect's Actions.** "[T]he scope of a consent search is not limited only to those areas or items for which specific verbal permission is granted." Jones, 356 F.3d at 534. Instead, "[c]onsent may be supplied by non-verbal conduct as well." Id. See, e.g., Garrido-Santana, 360 F.3d at 576 (In upholding consent search, court noted that, "although defendant had the opportunity to do so, he never objected to the officers' search of the gas tank and, thus, neither clarified that the scope of his sweeping consent excluded such a search nor revoked his consent"); United States v. Jackson, 381 F.3d 984, 988 (10th Cir. 2004) ("A defendant's failure to limit the scope of a general authorization to search, and failure to object when the search exceeds what he later claims was a more limited consent, is an indication that the search was within the scope of consent"); United States v. Mendoza-Gonzalez, 318 F.3d 663, 670 (5th Cir.), cert. denied, 538 U.S. 1049 (2003) ("A failure to object to the breadth of the search is properly considered an indication that the search was within the scope of the initial consent"); United States v. Pena, 920 F.2d 1509, 1514-15 (10th Cir. 1990), cert. denied, 501 U.S. 1207 (1991) (Holding that a search of a vehicle's vent panel was within the scope of the defendant's consent to "look" inside the vehicle where the defendant never "attempted to limit or retract his [general] consent" upon seeing the officer begin to remove that panel).

- d. **Destruction of Property Based Upon Consent.** It is typically unreasonable to believe that an individual who has given a general consent to search is consenting to having his or her property damaged or destroyed. Garrido-Santana, 360 F.3d at 576 (“A reasonable person likely would have understood his consent to exclude a search that would damage his property”). Thus, when dealing with a locked container, a law enforcement officer should seek express permission to search that item. *See, e.g., United States v. Osage*, 235 F.3d 518, 522 (10th Cir. 2000)(Holding that, “before an officer may actually destroy or render completely useless a container which would otherwise be within the scope of a permissive search, the officer must obtain explicit authorization, or have some other, lawful, basis upon which to proceed”); United States v. Strickland, 902 F.2d 937, 942 (11th Cir. 1990)(“Although an individual consenting to a vehicle search should expect that search to be thorough, he need not anticipate that the search will involve the destruction of his vehicle, its parts or contents”). If the consent is granted, the search may proceed. In order to support the reasonableness of any such search, a law enforcement officer should refrain from damaging or destroying the container in the process of opening it. *See, e.g., United States v. Snow*, 44 F.3d 133, 135 (2d Cir. 1995)(Upholding search of a duffel bag and another bag in part because “[n]either was locked or otherwise secured, and no damage to the bags was required to gain access”). If a key is necessary, for example, the officer should obtain the key and utilize it to gain access to the container.
3. **Third Party Consent Situations.** The types of third party consent situations that may confront a law enforcement officer are limitless. Nonetheless, some basic situations frequently arise in consent cases.
- a. **Husband – Wife Situations.** “Absent an affirmative showing that the consenting spouse has no access to the property searched, the courts generally hold that either spouse may consent to search all of the couple’s property.” *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations*, Computer Crime and Intellectual Property Section, Criminal Division, DOJ, at 19 (March 2001). *See also United States v. Backus*, 349 F.3d 1298, 1299 (11th Cir. 2003)(“Under [the] common authority doctrine, a spouse who jointly owns and occupies the marital home with the defendant may consent to a search of it with the same effect as if the defendant himself had done so”); United States v. Robinson, 999 F. Supp. 155, 159 (D. Mass. 1998)(“A familial relationship, such as that of a ... husband and wife, weighs in support of authority to consent”).

- 1) **Some Court Have Held That a Spouse Presumptively Has Authority to Consent.** At least one court has held that “a spouse presumptively has authority to consent to a search of all areas of the homestead; the nonconsenting spouse may rebut this presumption only by showing that the consenting spouse was denied access to the particular area searched.” United States v. Duran, 957 F.2d 499, 505 (7th Cir. 1992). See also Rith, 164 F.3d at 1330 (“Relationships which give rise to a presumption of control of property include ... husband-wife relationships”); United States v. Gevedon, 214 F.3d 807, 811 (7th Cir.), cert. denied, 531 U.S. 916 (2001)(Same).
 - 2) **A Spouse’s Consent May Be Effective Even After the Spouse Leaves the Marital Home.** Several courts have held that a spouse's consent may be effective even after he or she leaves the marital home. See, e.g., Backus, 349 F.3d at 1304-05 (“Our conclusion finds support in the decisions from all of the other circuits that have addressed issues involving consent from an estranged wife to search the marital home from which she has fled, all of which uphold the resulting searches under various circumstances”); Gevedon, 214 F.3d at 808-11; United States v. Brannan, 898 F.2d 107, 108 (9th Cir.), cert. denied, 498 U.S. 833 (1990); United States v. Trzaska, 859 F.2d 1118, 1120 (2d Cir. 1988), cert. denied, 493 U.S. 839 (1989); United States v. Crouthers, 669 F.2d 635, 643 (10th Cir. 1982); United States v. Long, 524 F.2d 660, 661 (9th Cir. 1975); see also United States v. Shelton, 337 F.3d 529 (5th Cir. 2003)(Involving an estranged wife who left because of her husband’s infidelity).
- b. **Parent – Child Situations.** Consent in parent-child situations can be divided into those where the child was a minor, and those where the child was above the age of 18. .

- 1) **Parents Can Ordinarily Consent to a Search of a Minor Child's Property.** As a general rule, "when the perpetrator is a minor, parental consent to search the perpetrator's property and living space will almost always be valid." *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations*, Computer Crime and Intellectual Property Section, Criminal Division, DOJ, at 20 (March 2001). See, e.g., Rith, 164 F.3d at 1330; United States v. Whitfield, 939 F.2d 1071, 1075 (D.C. Cir. 1991)("When a minor child's room is involved, agents might reasonably assume that the child's mother, in the performance of her parental duties, would not only be able to enter her child's bedroom but also would regularly do so"); United States v. Di Prima, 472 F.2d 550, 551 (1st Cir. 1973)("Even if a minor child, living in the bosom of a family, may think of a room as 'his,' the overall dominance will be in his parents"); Robinson, 999 F. Supp. at 157 ("Precedents have firmly established that a parent may consent to the search of a minor's bedroom").
- 2) **Whether a Parent Can Consent to a Search of an Adult Child's Property Depends on Various Factors.** Where an adult child still lives in the home of his or her parents, the issue of parental consent becomes more complicated. In determining whether a parent can consent to a search of an adult child's living areas, courts have focused on two distinct questions.
 - a) **Does the Adult Child Pay Rent?** "Evidence that the defendant paid rent to the third party would tend to show a landlord-tenant relationship." Rith, 164 F.3d at 1331. See also Robinson, 999 F. Supp. at 159 (Where officers failed to make "any inquiry as to whether [child] paid rent," the government could not make "any evidentiary showing of a landlord-tenant relationship"); United States v. Durham, 1998 U.S. Dist. LEXIS 15482 (D. Kan. 1998) (Mother's consent to search son's room in attached garage invalid where, *inter alia*, "defendant had an arrangement with his mother to pay rent").

b) **Has the Child Taken Any Steps to Deny the Parents Access or Use of the Room?** “While ... parent-child relationships give rise to a presumption of control for most purposes over the property, that presumption may be rebutted by facts showing an agreement or understanding between the defendant and the third party that the latter must have permission to enter the defendant’s room.” Rith, 164 F.3d at 1330-1331. Examples of this “include a lock on the bedroom door or an agreement, explicit or implicit, that the third party never enter a particular area.” Id. at 1331. *See also* Robinson, 999 F. Supp. at 159 (“Generally, a mother has access to the bedroom of an adult son who still lives at home for usual household activities”); Durham, 1998 U.S. Dist. LEXIS 15482 (“The fact that the defendant’s mother’s keys did not work on either the interior or exterior doors to the locked bedroom was, or should have been, a clear signal to the officers that the defendant was asserting a separate privacy interest in the bedroom”).

3) **A Minor Child May Consent to a Search of a Parent’s Home.** Various circuits have addressed the issue of whether a minor child may consent to a search of a parent’s home or property. Assuming that the child has authority over the area to be searched, these circuits hold that “minority does not, *per se*, bar a finding of actual authority to grant third-party consent to entry.” United States v. Gutierrez-Hermosillo, 142 F.3d 1225, 1231 (10th Cir.), cert. denied, 525 U.S. 900 (1998)(Finding consent given by 14-year old to be valid). Instead, a child’s “minority is a factor in determining the voluntariness of her consent.” Id. *See, e.g.,* United States v. Clutter, 914 F.2d 775, 778 (6th Cir. 1990), cert. denied, 499 U.S. 947 (1991)(Consent given by twelve and fourteen year old boys found valid); Lenz v. Winburn, 51 F.3d 1540, 1548-1549 (11th Cir. 1995)(Consent given by 9-year old found valid).

- c. **Roommate Situations.** As a general rule, “when an apartment, for example, is shared, one ordinarily assumes the risk that a co-tenant might consent to a search, at least to all common areas and those areas to which the other has access.” United States v. Ladell, 127 F.3d 622, 624 (7th Cir. 1997). See also Janis, 387 F.3d at 686 (“An adult co-occupant of a residence may consent to a search”)(citation omitted); Duran, 957 F.2d at 505 (“Two friends inhabiting a two-bedroom apartment might reasonably expect to maintain exclusive access to their respective bedrooms, without explicitly making this expectation clear to one another”). “Unless the complaining co-tenant has somehow limited the other’s access to a piece of property, the consenting co-tenant’s authority extends to all items on the premises.” United States v. Richard, 994 F.2d 244, 250 (5th Cir. 1993). However, see Georgia v. Randolph, 547 U.S. 103, 126 S. Ct. 1515 (2006) (A person with authority over the place to be searched can not give valid consent over the objection of a present objector who also has authority over the place to be searched.)
- d. **Landlord – Tenant Situations.** “In general, a landlord does not have common authority over an apartment or other dwelling unit leased to a tenant.” United States v. Elliott, 50 F.3d 180, 185 (2d Cir. 1995), cert. denied, 516 U.S. 1050 (1996)[citing Chapman v. United States, 365 U.S. 610, 616-18 (1961)]. However, a “landlord does ... have authority to consent to a search by police of dwelling units in his building that are not leased.” Id. “Further, if the landlord has joint access or control over certain areas of his apartment building for most purposes, he may validly consent to a search of those areas.” Id.
4. **Third Party Consent Rules Do Not Apply When Another Present Party With Authority Objects.** In 2006, the Supreme Court ruled that the consent of one party with authority over the place to be searched is not valid if another party with authority is present, and refuses to give his consent for the search. Law enforcement officers are not required to try to locate any or all of those who might give or refuse consent to search; however, the officers may not isolate or remove the potentially non-consenting party in order to avoid a possible objection to the search. Georgia v. Randolph, 547 U.S. 103, 121-22 (2006).

- a. **The Person Objecting May Not Have to be Present.** Although Georgia v. Randolph addressed only physically present objectors, the Ninth Circuit has extended Randolph to hold that the objection of a *non-present* party with authority over the area to be searched will defeat consent of a present party. United States v. Murphy, 2008 U.S. App. LEXIS 3505 (9th Cir. 2008) (holding that even when the objector is not present at the scene, “once a co-tenant has registered his objection, his refusal to grant consent remains effective barring some objective manifestation that he has changed his position and no longer objects”). The Eighth Circuit disagrees, holding that the objecting party must be physically present at the scene to defeat consent. US v. Hudspeth, 2008 U.S. App. Lexis 5157 at *18 (8th Cir. 2008) (en banc) (relying on the Randolph Court’s admission that “we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact *at the door and objects*, the co-tenant’s permission does not suffice for a reasonable search.’ Hudspeth was not at the door and objecting and does not fall within Randolph’s ‘fine line.’”) (emphasis in original; internal citations omitted).
- b. **Removal of a Potential Objector for a Proper Purpose Is Lawful.** In United States v. Dimodica, 468 F.3d 495 (7th Cir. 2006), defendant’s wife reported that she had been abused by her husband. The wife also told agents that defendant used drugs and likely had drugs and drug paraphernalia in their home, that defendant owned several firearms and likely had firearms in their home, and that defendant was a convicted felon. Police determined that there was probable cause to arrest defendant for abuse and obtained the wife’s permission to search the home. The police found weapons. Defendant contended that the search violated his Fourth Amendment rights because he did not consent to the search. The court found that the officers legally arrested the defendant based on probable cause that he had committed domestic abuse. Once defendant was arrested and removed from the scene, the wife’s consent alone was valid and permitted the officers to legally search the residence.

- c. **There is No Requirement to Seek Out Co-Tenants or to Bring Them to the Scene to Object.** In United States v. Wilburn, 473 F.3d 742 (7th Cir. 2007), a defendant who was suspected of firearms offenses was arrested for an unrelated traffic violation near his home. The defendant was not informed of the firearms investigation. Officers went to the defendant's home, which he shared with his girlfriend, and obtained consent from the girlfriend to search the home. The defendant, who was outside in the back of the patrol car, was not asked for consent (nor did he offer an objection on his own). When the defendant later challenged the admissibility of the evidence found inside the home, the court held that because the defendant was lawfully arrested and treated like any other arrestee, he was not kept from the premises for the sole purpose of avoiding his objection to the search. The girlfriend's consent was valid; the police were not obligated to bring the defendant to the home so he could be a party to the discussion regarding consent.

5. **The Doctrine of "Consent Once Removed."**

The doctrine of "consent once removed" is used primarily in narcotics cases. However, its application is not limited to those types of situations. Accordingly, the instructor may wish to present an overview of the concept. This material is not included in the Student Handbook and is not tested.

- a. **"Consent Once Removed" - Generally.** Generally, the police are required to knock on the door, announce their presence and await admittance for a reasonable time before forcibly entering a residence. See Wilson v. Arkansas, 514 U.S. 927, 929 (1995). However, it is well established that an undercover officer may gain entrance by misrepresenting his identity and may gather evidence while there. See Lewis v. United States, 385 U.S. 206, 211 (1966) ("A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant"); United States v. Bramble, 103 F.3d 1475, at *6 (9th Cir. 1996) ("If undercover agents, when asked if they were police officers, were required to answer truthfully, their lives would be placed in danger. If a lie in response to such a question made all evidence gathered thereafter the inadmissible fruit of an unlawful entry, all dealers in contraband could insulate themselves from investigation merely by asking every person they contacted in their business to deny that he or she was a law enforcement agent").

- b. **“Consent Once Removed” - The Rule.** “The concept of consent once removed is, ultimately, a variation of the ‘traditional’ consent doctrine.” United States v. Jachimko, 19 F.3d 296, 299 (7th Cir. 1994). Stated succinctly, the rule provides as follows: “When one invites an undercover agent into his house, the agent can summon other agents to assist in the arrest, and the other agents are not guilty of a violation of the Fourth Amendment.” United States v. Paul, 808 F.2d 645, 648 (7th Cir. 1986). *See also* United States v. Brothers, 30 M.J. 289, 292 (C.M.A. 1990)(Noting, “there is authority that, after a consensual entry of the premises has been made by an undercover agent (be he a law-enforcement officer or merely an informant) for the purpose of buying drugs, the agent may reenter with law-enforcement assistance”). In essence, the initial consent is “transferred” to other officers so that they may enter and effect the search and/or arrest. *See also* United States v. Akinsanya, 53 F.3d 852, 856 (7th Cir. 1995). The rationale for the rule is simply this: “Once consent has been obtained from one with authority to give it, any expectation of privacy has been lost. We seriously doubt that the entry of additional officers would further diminish the consenter's expectation of privacy, and, in the instant case, any remaining expectation of privacy was outweighed by the legitimate concern for the safety of [the officers inside].” United States v. Rubio, 727 F.2d 786, 797 (9th Cir. 1983).
- c. **“Consent Once Removed” - The Requirements.** Generally speaking, there are three requirements for a valid situation involving “consent once removed.”
- 1) **Initial Entry With Permission of Authorized Individual.** First, the initial entry into the premise must have been with the permission of someone authorized to consent.
 - 2) **Probable Cause to Arrest or Search is Developed.** Second, probable cause to effect a search or arrest must be established.
 - 3) **Assistance From Other Officers is Immediately Summoned.** Third, the government agent or informant must immediately summon help from other officers.
- See, e.g.,* Bramble, 103 F.3d at 1478; Akinsanya, 53 F.3d at 856 (“The doctrine of ‘consent once removed’ is applicable where the undercover agent or government informant: (1) entered at the express invitation of someone with authority to consent; (2) at that point established the existence of probable cause to effectuate an arrest or search; and (3) immediately summoned help from other officers”); United States v. Pollard, 251 F.3d 643, 648 (6th Cir.), *cert. denied*, 531 U.S. 999 (2000)(Same); United States v. Samet, 794 F. Supp. 178, 181 (E.D. Va. 1992)(Same).

- d. **The Circuits are Split on Whether “Consent Once Removed” Applies to Both Undercover Agents and Confidential Informants.** Whether the initial consent was granted to an undercover agent or a confidential informant is of no constitutional significance in the Sixth and Seventh Circuits. Where an undercover officer may invite other officers inside the home, the same principle “extends to the case where the initial, consensual entry is by a confidential informant.” Paul, 808 F.2d at 648. *See also* Jachimko, 19 F.3d at 299; United States v. Yoon, 398 F.3d 802, 807 (6th Cir. 2005). The Tenth Circuit, however, has rejected this expansion of “consent once removed,” holding that the doctrine does not apply to those other than law enforcement officers. Callahan v. Millard County, 494 F.3d 891, 897 (10th Cir. 2007).

NOTE: On March 24, 2008, the Supreme Court granted certiorari to determine whether “consent once removed” applies to those other than law enforcement officers. Pearson v. Callahan, 2008 U.S. LEXIS 2865 (2008).

- e. **In Utilizing “Consent Once Removed,” Officers May Not Exceed the Scope of the Original Consent Given.** “When entering pursuant to the suspect’s ‘consent once removed,’ ... the additional backup officers are restricted to the scope of the consent originally given.” Bramble, 103 F.3d at *8 (internal citations omitted). *See also* Pollard, 215 F.3d at 649 (Noting “the back-up officers were acting within constitutional limits when they entered to assist him since no further invasion of privacy was involved once the undercover officer made the initial entry”).
- f. **Under the “Consent Once Removed” Doctrine, the Re-Entry to Effect the Arrest or Search Must Be “Immediate.”** Suffice it to say, “one consensual entry [doesn not] mean that law enforcement agents may thereafter enter and exit a home at will.” United States v. Diaz, 814 F.2d 454, 459 (7th Cir.), *cert. denied*, 484 U.S. 857 (1987). Instead, the re-entry must be “immediate,” although what exactly is meant by that term is subject to interpretation. ***Compare*** United States v. Santiago, 1993 U.S. Dist. LEXIS 3242 at *11 (N.D. Ill. 1993)(Upholding re-entry 15 minutes after exit where officers’ “actions after the CI established probable cause essentially constituted an unbroken chain of events, and the arrests were executed without interruption or significant loss of time”), ***with*** United States v. Robeles-Ortega, 348 F.3d 679 (7th Cir. 2003) (Finding re-entry after 2 minutes impermissible where the undercover agent did not remain in the apartment; the CI did not momentarily step outside, then knock on the door; and the officers did not “enter the apartment at the same time that the CI exited).

X. **EPO #24: IDENTIFY THE REQUIREMENTS ALLOWING AN INVENTORY OF
LAWFULLY IMPOUNDED PERSONAL PROPERTY**

1. **General Rule – Inventory Searches are an Exception to the Warrant Requirement.** Inventory searches are a “well-defined exception to the warrant requirement of the Fourth Amendment.” Colorado v. Bertine, 479 U.S. 367, 371 (1987). See also United States v. Rowland, 341 F.3d 774, 779 (8th Cir. 2003)(“Law enforcement may search a lawfully impounded vehicle to compile an inventory list of the vehicle’s contents without violating the Fourth Amendment”). In sum, once an item (e.g., a vehicle) has been lawfully impounded, an inventory search may be conducted if it is done “reasonably.” South Dakota v. Opperman, 428 U.S. 364, 372 (1976). An inventory will be “reasonable” if it is undertaken pursuant to standardized police procedures. Id. at 376.
 - a. **Evidence Found During a Valid Inventory Search is Admissible.** Where evidence is found during a lawfully conducted inventory search, it may be used against the defendant in a later trial. Because inventory searches are routine, non-criminal procedures whose justification does not hinge on the existence of probable cause, “the absence of a warrant is immaterial to the reasonableness of the search.” Illinois v. Lafayette, 462 U.S. 640, 643 (1983). See also Rowland, 341 F.3d at 779 (In conducting an inventory, “officers need neither search warrant nor probable cause, for they are not investigating a crime; instead, they are ‘performing an administrative or care-taking function’”) (citation omitted).

- b. **Inventory Searches Are Not Permitted For the Sole Purpose of Discovering Incriminating Evidence.** To be reasonable under the Fourth Amendment, “an inventory must not be a ruse for a general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory.” Florida v. Wells, 495 U.S. 1, 4 (1990). Thus, where law enforcement officers act “in bad faith or for the sole purpose of investigation,” Bertine, 479 U.S. 373, an inventory search will be held invalid. Of course, a valid inventory search is not prohibited simply because a law enforcement officer also has an investigatory interest. “It is well established that the police are not precluded from conducting inventory searches when they lawfully impound the vehicle of an individual that they also happen to suspect is involved in illegal activity.” United States v. Wallace, 102 F.3d 346, 348 (8th Cir. 1996)(citation omitted). See also United States v. Petty, 367 F.3d 1009, 1013 (8th Cir. 2004)(“That an officer suspects he might uncover evidence in a vehicle ... does not preclude the police from towing a vehicle and inventorying the contents, as long as the impoundment is otherwise valid”); United States v. Rodriguez-Morales, 929 F.2d 780, 787 (1st Cir. 1991), cert. denied, 502 U.S. 1030 (1992)(“As long as impoundment pursuant to the community caretaking function is not a mere subterfuge for investigation, the coexistence of investigatory and caretaking motives will not invalidate the seizure”); United States v. Edwards, 242 F.3d 928, 938 (10th Cir. 2001)(“To be justified as an inventory search, however, the search cannot be investigatory in nature but must instead be used only as a tool to record the defendant’s belongings to protect the police from potential liability”).
- c. **Evidence Found During a Valid Inventory May Provide Justification For a More Thorough Search.** Where evidence is found during a lawful inventory search, that evidence may provide probable cause for a more thorough search under the vehicle exception to the warrant requirement. See, e.g., Michigan v. Thomas, 458 U.S. 259, 261-62 (1982)(per curiam)(discovery of marihuana during an inventory search could function as probable cause to support a second, more comprehensive search of the vehicle for additional contraband).
2. **There are Three Justifications for Conducting Inventory Searches.** In Opperman, the Supreme Court outlined three justifications for allowing law enforcement officers to inventory lawfully impounded property without first obtaining a warrant.
- a. **Inventory Searches Are Allowed to Protect the Owner’s Property.** First, there is a need for law enforcement to protect the owner’s property while it remains in police custody.

- b. **Inventory Searches Are Allowed to Protect Law Enforcement Officer Against Claims or Disputes.** Second, an inventory protects the police against claims or disputes over lost or stolen property.
- c. **Inventory Searches Are Allowed to Protect Law Enforcement Officers From Potential Dangers.** And third, an inventory is necessary for the protection of the police from potential dangers that may be located in the property.

Id. at 369. *See also* United States v. Moraga, 76 Fed. Appx. 223, 228 (10th Cir. 2003) (unpublished) (“Once officers have made a lawful decision to impound a vehicle, they may conduct an inventory search of the vehicle for three reasons: (1) to protect the owner’s property while in police custody, (2) to prevent claims of lost, stolen, or vandalized property, and (3) to guard the police from danger”); United States v. Green, 293 F.3d 855, 857 (5th Cir.), *cert. denied*, 537 U.S. 966 (2002) (“Warrantless inventory searches of seized automobiles do not violate the Fourth Amendment if they are conducted ‘pursuant to standardized regulations and procedures that are consistent with (1) protecting the property of the vehicle’s owner, (2) protecting the police against claims or disputes over lost or stolen property, and (3) protecting the police from danger’”).

- 3. **There are Generally Two (2) Requirements for a Valid Inventory Search.** In order to conduct an inventory search, two (2) requirements must be met. *See, e.g., United States v. Williams*, 936 F.2d 1243, 1248 (11th Cir. 1991), *cert. denied*, 503 U.S. 912 (1992) (“If a search is to be upheld under the inventory search doctrine, therefore, the police must first have the authority to impound the vehicle and must then follow the procedures outlined in the policy”).

- a. **The Property Must Be Lawfully Impounded.** First, the property that is being inventoried must have lawfully come into the possession of law enforcement officers. Generally, “an impoundment must either be supported by probable cause, or be consistent with the police role as ‘caretaker’ of the streets and completely unrelated to an ongoing criminal investigation.” United States v. Duguay, 93 F.3d 346, 352 (7th Cir. 1996), *cert. denied*, 526 U.S. 1029 (1999). *See, e.g., Cady v. Dombrowski*, 413 U.S. 433, 441 (1973) (Noting that vehicles are commonly taken into police custody based upon “community caretaking functions,” such as towing vehicles for violating parking ordinances and removing vehicles from accident scenes); Petty, 367 F.3d at 1012 (“Police may take protective custody of a vehicle when they have arrested its occupants, even if it is lawfully parked and poses no public safety hazard”) (citation omitted); United States v. Brown, 787 F.2d 929, 931-32 (4th Cir.), *cert. denied*, 479 U.S. 837 (1986) (“For an inventory search to be valid, the vehicle searched should first be in the valid custody of the law enforcement officers conducting the inventory”). The lawful impoundment of a vehicle, for example, is generally based upon one of two distinct sources of authority.

- 1) **Violations of Motor Vehicle Laws.** One source of authority for the impoundment of a stopped, parked, or abandoned vehicle would be a violation of local and state motor vehicle laws. See, e.g., Opperman, 428 U.S. at 375 (“The inventory was conducted only after the car had been impounded for multiple parking violations”); United States v. Rios, 88 F.3d 867, 870 (10th Cir. 1996)(Upholding defendant’s motion to suppress because “the government failed to show that the impoundment of the vehicle satisfied [state] law ...”).
- 2) **“Community Caretaking” Function.** “Impoundment of a vehicle for the safety of the property and the public is a valid ‘community caretaking’ function of the police.” Petty, 367 F.3d at 1011-12 (citation omitted). See also United States v. Proctor, 489 F.3d 1348 (D.C. Cir. 2007) (“The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge.”); Rios, 88 F.3d at 870 (Upholding defendant’s motion to suppress because “the government failed to show that the impoundment of the vehicle satisfied ... the public safety exception of South Dakota v. Opperman”). As noted by one court: “The policeman plays a rather special role in our society; in addition to being an enforcer of the criminal law, he is a ‘jack-of-all-emergencies,’ ... expected to aid those in distress, combat actual hazards, prevent potential hazards from materializing, and provide an infinite variety of services to preserve and protect community safety. Recognition of this multifaceted role led to the Court’s coinage of the ‘community caretaking’ label in Cady v. Dombrowski.” Rodriguez-Morales, 929 F.2d at 784-85. Further:

“Dealing with vehicle-related problems ranks among such responsibilities. Because of the ubiquity of the automobile in modern American civilization, and the automobile’s nature -- mechanically delicate, highly mobile, safely operable only by trained and licensed individuals -- the police are constantly faced with dynamic situations, no two quite identical, in which they, in the exercise of their community caretaking function, must interact with car and driver to promote public safety. Not surprisingly, our fourth amendment jurisprudence has incorporated this reality.” Id. at 785.

See also United States v. Kornegay, 885 F.2d 713, 716 (10th Cir. 1989), cert. denied, 495 U.S. 935 (1990)(Finding a vehicle legally impounded where it was legally parked in a public parking lot but defendant was alone, was unlikely to be returning soon because of his arrest, and the car would have been left open to dangers of vandalism or theft).

- b. **There Must Also Be a Standardized Policy That Governs the Conduct of the Inventory.** The second requirement of a valid inventory search is that the inventory be conducted in accordance with a standardized inventory policy aimed at accomplishing the justifications for inventory searches. See Florida v. Wells, 495 U.S. at 4 (“Standardized criteria or established routine must regulate” inventory searches). As noted by the Supreme Court: “The underlying rationale for allowing an inventory exception to the Fourth Amendment warrant rule is that police officers are not vested with discretion to determine the scope of the inventory search. This absence of discretion ensures that inventory searches will not be used as a purposeful and general means of discovering evidence of crime.” Bertine, 479 U.S. at 376 (Blackmun, J., concurring)(citation omitted). See also Petty, 367 F.3d at 1012 (“Some degree of ‘standardized criteria’ or ‘established routine’ must regulate these police actions ...”); United States v. Hurst, 228 F.3d 751, 758 (6th Cir. 2000)(“It is well-established that law enforcement officers may make a warrantless search of a legitimately seized vehicle provided the inventory is conducted according to standardized criteria or established routine”); United States v. Bullock, 71 F.3d 171, 177 (5th Cir. 1995), cert. denied, 517 U.S. 1126 (1996)(“In order to prevent inventory searches from concealing such unguided rummaging, Supreme Court has dictated that a single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront”)(quotation and citation omitted).
- 1) **Written Inventories Are Not Required.** While the law enforcement agency involved must have a “standardized” inventory policy, several courts have upheld unwritten standardized policies. See, e.g., United States v. Griffiths, 47 F.3d 74, 78 (2d Cir. 1995); United States v. Frank, 864 F.2d 992, 1002 (3rd Cir. 1988); United States v. Ford, 986 F.2d 57, 60 (4th Cir. 1993); Bullock, 71 F.3d at 177. Nonetheless, as a practical matter, the best way for a law enforcement agency to avoid difficulty with this particular requirement would be to reduce their standardized inventory policy to writing.
 - 2) **Law Enforcement Agencies May Establish Their Own Policies.** Law enforcement agencies may establish their own standardized policies, so long as they are reasonably constructed to accomplish the goals of inventory searches and are conducted in good faith.

- 3) **Proving the Existence of a Standardized Inventory Procedure.** "The existence of ... a valid procedure may be proven by reference to either written rules and regulations or testimony regarding standard practices." United States v. Mendez, 315 F.3d 132, 137 (2d Cir. 2002). *See also* Petty, 367 F.3d at 1012 ("It would have been simpler for the government to present the police department's written impoundment policy, but testimony can be sufficient to establish police procedures ...").
4. **The Standardized Policy of the Agency Determines the Scope of an Inventory Search.** The scope of an inventory search is defined by the standardized inventory policy of the particular agency involved. As a general rule, however, inventory searches may not extend any further than is reasonably necessary to discover valuables or other items for safekeeping. For example, when conducting an inventory search of a vehicle, law enforcement officers are not justified in looking into the heater ducts or inside the door panels of a vehicle, in that valuables are not normally kept in such locations.
- a. **Passenger Compartment.** The Supreme Court has upheld inventory searches of the passenger compartments of vehicles. Opperman, 428 U.S. at 376; Bertine, 479 U.S. at 376. *See also* United States v. Patterson, 140 F.3d 767, 773 (8th Cir), *cert. denied*, 525 U.S. 907 (1998). This would normally include searches of glove compartments. Opperman, 428 U.S. at 372 (Noting "standard inventories often include an examination of the glove compartment, since it is a customary place for documents of ownership and registration ... as well as a place for the temporary storage of valuables")(internal citation omitted).
- b. **Trunks.** Additionally, inventory searches of the trunk have also been found valid. Dombrowski, 413 U.S. at 448; United States v. Judge, 864 F.2d 1144, 1146 (5th Cir. 1989); Goodson v. City of Atlanta, 763 F.2d 1381, 1386 (11th Cir. 1985). However, it should be remembered that "[e]xcessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search not subject to suppression." United States v. Ramirez, 523 U.S. 65, 71 (1998). Thus, where a trunk is locked, courts may require officers "ordinarily to use master keys or similar tools to gain entry" and comply with the Fourth Amendment. United States v. Tueller, 349 F.3d 1239, 1245 (10th Cir. 2003).
- c. **Containers.** Inventory searches of containers, locked or unlocked, may be conducted, so long as the standardized inventory policy permits. Opperman, 428 U.S. at 371 ("When the police take custody of any sort of container [such as] an automobile ... it is reasonable to search the container to itemize the property to be held by the police"); Bertine, 479 U.S. at 376; Lafayette, 462 U.S. at 648; Wells, 495 U.S. at 4.

- d. **Engine Compartment.** “A valid inventory search conducted by law enforcement officers according to standard procedure may include the engine compartment of a vehicle.” United States v. Lumpkin, 159 F.3d 983, 988 (6th Cir. 1998). See also United States v. Lewis, 3 F.3d 252, 254 (8th Cir. 1993), cert. denied, 511 U.S. 1111 (1994).
5. **There is No Particular Location Where an Inventory Must Be Conducted.** “Although inventory searches typically occur at a police station or an impoundment facility, rather than at the time of the arrest ... the Fourth Amendment does not require that police conduct inventory searches at any particular location.” Mendez, 315 F.3d at 137 n.3 [*citing* Lafayette, 462 U.S. at 641 (Police station); Opperman, 428 U.S. at 366 (Impoundment facility); Wells, 495 U.S. at 2 (Impoundment facility); United States v. Thompson, 29 F.3d 62, 64 (2d Cir. 1994)(Impoundment facility); Bertine, 479 U.S. at 368-69 (Uholding inventory search performed when the suspect was taken into custody, before the tow truck arrived)]. See also Williams, 936 F.2d at 1248-49 (On-site inventory of vehicle upheld); United States v. Chambers, 59 Fed. Appx. 509, 510 (4th Cir.) (unpublished), cert. denied, 538 U.S. 1051 (2003)(“An on-site inventory search, as opposed to one that is conducted at an impound lot, is permissible so long as the officer had the initial authority to impound the vehicle”).

Y. **EPO #25: IDENTIFY THE CIRCUMSTANCES WHEN AN INSPECTION IS PERMITTED FOR REAL AND PERSONAL PROPERTY**

1. **General Rule – Administrative Inspections (Searches) are an Exception to the Warrant Requirement.** The Supreme Court has “allowed searches for certain administrative purposes without particularized suspicion of misconduct, provided that those searches are appropriately limited.” City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000). Generally termed “inspections,” these types of administrative searches take place in a variety of different forums, and are directed against both personal and real property. Some of the more common “inspections” are discussed below.

2. **The Purpose of an Administrative Search is Not to Investigative Criminal Activity.** Administrative searches may not be used to investigate criminal activity. “If the primary object of the search is to gather evidence of criminal activity, a criminal search warrant may be obtained only on a showing of probable cause to believe that relevant evidence will be found in the place to be searched.” Michigan v. Clifford, 464 U.S. 287, 294 (1984). Of course, “if evidence of criminal activity is discovered during the course of a valid administrative search, it may be seized under the ‘plain view’ doctrine ... [and] may be used to establish probable cause to obtain a criminal search warrant.” Id. See also New York v. Burger, 482 U.S. 691, 716 (1987)(“The discovery of evidence of crimes in the course of an otherwise proper administrative inspection does not render that search illegal or the administrative scheme suspect”); United States v. Bulacan, 156 F.3d 963, 973 (9th Cir. 1998)(“When an administrative search scheme encompasses both a permissible and an impermissible purpose, and when the officer conducting the search has broad discretion in carrying out the search, that search does not meet the Fourth Amendment’s reasonableness requirements”). Sanchez v. County of San Diego, 464 F.3d 916 (9th Cir. 2006) (Consent-based home inspections to prevent welfare fraud, where the only ramification of refusal to consent is ineligibility for welfare benefits is not an unreasonable as the inspections are not conducted to detect criminal activity.)
3. **Sobriety Checkpoints Are Permissible.** The use of highway sobriety checkpoints does not violate the Fourth Amendment. See Michigan Dep’t of State Police v. Sitz, 496 U.S. 444, 447 (1990). In reaching this conclusion, the Court balanced “the State’s interest in preventing accidents caused by drunk drivers, the effectiveness of sobriety checkpoints in achieving that goal, and the level of intrusion on an individual’s privacy caused by the checkpoints.” Id. at 449. And, “in sum, the balance of the State’s interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of [sobriety checkpoints].” Id. at 455.
4. **Driver’s License and Registration Checkpoints Are Permissible.** In Delaware v. Prouse, 440 U.S. 648, 663 (1979), the Supreme Court “suggested that a similar type of roadblock [as that in Sitz] with the purpose of verifying drivers’ licenses and vehicle registrations would be permissible.” Edmond, 531 U.S. at 38.

5. **Information - Gathering Checkpoints Are Permissible.** “[S]pecial law enforcement concerns will sometimes justify highway stops without individualized suspicion.” Illinois v. Lidster, 540 U.S. 419, 124 S. Ct. 885, 889 (2004). Such is the case in a situation where the checkpoint is set up to gather information regarding a previous crime, as it was in Lidster. Thus, where “[t]he stop’s primary law enforcement purpose [is] *not* to determine whether a vehicle’s occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others,” *id.*, no individualized suspicion is necessary. In fact, “the concept of individualized suspicion has little role to play” in this type of situation, *id.*, in that “an information-seeking stop is not the kind of event that involves suspicion, or lack of suspicion, of the relevant individual.” *Id.* Finally, “information-seeking highway stops are less likely to provoke anxiety or to prove intrusive. The stops are likely brief. The police are not likely to ask questions designed to elicit self-incriminating information. And citizens will often react positively when police simply ask for their help as ‘responsible citizens’ to ‘give whatever information they may have to aid in law enforcement.’” *Id.* (citation omitted).
6. **Checkpoints For General Crime Control Purposes Are Impermissible.** The Supreme Court has “never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing.” Edmond, 531 U.S. at 41. Instead, the Court has “recognized only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion.” *Id.* Additionally, “each of the checkpoint programs [the Court has] approved was designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety.” *Id.* The Court has been “particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends.” *Id.* at 43. Thus, in Edmond, where the “primary purpose of the ... narcotics checkpoints [was] ... to advance ‘the general interest in crime control,’” *id.* at 44, the Court “decline[d] to suspend the usual requirement of individualized suspicion where the police [sought] to employ a checkpoint primarily for the ordinary enterprise of investigating crimes.” *Id.*
7. **Administrative Inspections of Businesses.** “The inspection of business premises and operations is commonplace in our society. Virtually all businesses, without regard to their character, are subject to inspection of their premises to ensure compliance with fire, health, and safety regulations.” 4 W. LaFave, *Search and Seizure* § 10.2, p. 401 (3d ed. 1996).
 - a. **Administrative Searches Generally Require Warrants.** The Supreme Court has repeatedly held “that administrative searches generally require warrants.” Clifford, 464 U.S. at 291. See Marshall v. Barlow’s, Inc., 436 U.S. 307, 324 (1978); Michigan v. Tyler, 436 U.S. 499, 504-508 (1978); Camara v. Municipal Court, 387 U.S. 523, 534 (1967); See v. City of Seattle, 387 U.S. 541, 543-544 (1967).

- 1) **Warrants in Administrative Search Cases Do Not Require Traditional Probable Cause.** When a law enforcement officer obtains an administrative search warrant, “probable cause in the criminal law sense is not required.” Marshall, 436 U.S. at 320. “If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant.” Camara, 387 U.S. at 539. Thus, “for purposes of an administrative search ... probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that ‘reasonable legislative or administrative standards for conducting an ... inspection are satisfied with respect to a particular establishment.’” Marshall, 436 U.S. at 320 (internal footnote and brackets omitted)(citation omitted).
 - 2) **There Must Be a Regulatory Scheme for the Administrative Search.** “A search not authorized by [a] regulatory scheme is unreasonable unless it independently satisfies traditional Fourth Amendment requirements.” United States v. Payne, 181 F.3d 781, 787 (6th Cir. 1999). See Clifford, 464 U.S. at 294 n.5 (“Probable cause to issue an administrative warrant exists if reasonable legislative, administrative, or judicially prescribed standards for conducting an inspection are satisfied ...”).
 - 3) **Consent Should Normally Be Sought Before Obtaining a Warrant for an Administrative Search.** “As a practical matter and in light of the Fourth Amendment’s requirement that a warrant specify the property to be searched, it seems likely that warrants should normally be sought only after entry is refused” Camara, 387 U.S. at 539. This is because “most citizens allow inspections of their property without a warrant.” Id.
- b. **Closely Regulated Businesses.** The firearms and alcohol industries are among the most closely regulated in this country. “Because the owner or operator of commercial premises in a ‘closely regulated’ industry has a reduced expectation of privacy, the warrant and probable cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness for a government search, have lessened application in this context.” Burger, 482 U.S. at 702 (internal citation omitted). See also United States v. Mendoza-Gonzalez, 363 F.3d 788, 794 (8th Cir. 2004) (“Commercial trucking is a closely regulated industry within the meaning of Burger”)(citation omitted). Accord United States v. Vasquez-Castillo, 258 F.3d 1207, 1210 (10th Cir. 2001); United States v. Fort, 248 F.3d 475, 480-82 (5th Cir.), cert. denied, 534 U.S. 977 (2001); United States v. Dominguez-Prieto, 923 F.2d 464, 468-70 (6th Cir.), cert. denied, 500 U.S. 936 (1991).

- 1) **Rationale for the “Closely Regulated Business” Exception.**
There are two justifications for allowing warrantless administrative searches of closely regulated businesses.
 - a) **Inspection Purpose Could Be Easily Frustrated.** “If inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible.” United States v. Biswell, 406 U.S. 311, 316 (1972). *See also Crosby v. Paulk*, 187 F.3d 1339, 1347 (11th Cir. 1999)(“Unannounced or surprise inspections are crucial if the regulatory scheme ... is to function at all”)(citation omitted).
 - b) **Pervasive Regulation Reduces the Expectation of Privacy.** The Supreme Court has “recognized a reduced expectation of privacy for regulated industries, and, thus, the Fourth Amendment standard of reasonableness for a government search has lessened application in this context.” Fort, 248 F.3d at 482. *See Burger*, 482 U.S. at 702 (Holding that “owner or operator of commercial premises in a ‘closely regulated’ industry has a reduced expectation of privacy”).
- 2) **Search of “Closely Regulated Business” Still Must Be Reasonable.** Notwithstanding the above, a warrantless search of even a closely regulated business must be “reasonable.” In this context, a “warrantless inspection ... will be deemed to be reasonable only so long as three criteria are met.” Burger, 482 U.S. at 702.
 - a) **There Must Be a Substantial Government Interest.** First, there must be a “substantial” government interest in the regulatory scheme pursuant to which the inspection is made, Id.;
 - b) **The Warrantless Inspection Must Be Necessary.** “Second, the warrantless inspections must be ‘necessary to further the regulatory scheme,’” Id. (internal brackets omitted);

- c) **The Inspection Program Must Provide an Adequate Substitute for a Warrant.** Third, "the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant," *Id.* at 703. In essence, "the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." *Id.*
- 3) **Administrative Inspections May Not Be Used as a Pretext for Gathering Criminal Evidence.** "Although the government may address a problem in a regulated industry through administrative and penal sanctions ... an administrative inspection may not be used as a pretext solely to gather evidence of criminal activity." *United States v. Johnson*, 994 F.2d 740, 742 (10th Cir. 1993). See also *Whren v. United States*, 517 U.S. 806, 811-12 (1996) (Noting that "the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are not made for those purposes"); *Anobile v. Pelligrino*, 274 F.3d 45, 59 (2d Cir. 2001) ("The Supreme Court has acknowledged, however, that a search may be invalid if the administrative inspection was a 'pretext' for obtaining evidence of general criminal activity").
8. **Security Checkpoints at Sensitive Government Facilities and Airports.** Security screening at sensitive government facilities and airports generally consists of using magnetometers and x-ray machines to examine individuals and their containers. It is clear that the use of both magnetometers and x-ray machines to scan individuals and their belongings constitutes a search implicating the Fourth Amendment. See *United States v. Epperson*, 454 F.2d 769, 770 (4th Cir.), *cert. denied*, 406 U.S. 947 (1972). It is equally clear that "a search conducted without a warrant is unreasonable unless it falls within one of the classes of permissible warrantless searches." *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973). The administrative search exception to the Fourth Amendment's probable cause and warrant requirements has been relied upon to support this type of security screening.

- a. **Searches at Security Checkpoints.** Screening searches conducted at designated security checkpoints in airports and sensitive government facilities fall within one of the permissible "classes" of warrantless searches, namely, administrative searches that are "conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as a part of a criminal investigation to secure evidence of a crime." United States v. Davis, 482 F.2d 893, 908 (9th Cir. 1973); Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967). Thus, the constitutionality of a security screening search does not depend on either ongoing consent or irrevocable implied consent. When a screening search is otherwise reasonable and conducted pursuant to statutory authority (such as 49 § U.S.C. 44901), all that is required is a person's election to attempt entry into the secured area of the facility. See, e.g., United States v. Aukai, 497 F.3d 955 (9th Cir. 2007) (airport security screening).
- b. **Searches Prior to Security Checkpoints.** Courts have been quick to note "a sharp distinction between a search conducted at an airport boarding gate and the search of certain persons in the general airport area." United States v. Wehrli, 637 F.2d 408, 409 n.1 (5th Cir. Unit B, 1981)(citations omitted). For example, in United States v. Skipwith, 482 F.2d 1272 (5th Cir. 1973), the court distinguished between "searches of persons in the general airport area" and those "who actually present themselves for boarding on an air carrier." Id. at 1276. Citing United States v. Moreno, 475 F.2d 44 (5th Cir. 1973), the court noted that, "while Moreno established that searches of persons in the general airport area are to be tested under a case-by-case application of the reasonableness standard, we hold that those who actually present themselves for boarding on an air carrier, like those seeking entrance into the country, are subject to a search based on mere or unsupported suspicion." Skipwith, 482 F.2d at 1276. In sum, it would appear that different standards apply to those who are searched at boarding gates as opposed to those who are simply within the general airport area when the search commences. As one commentator has noted:
- "[In Skipwith], the court concluded that the standard for initiating a search at the boarding gate would be similar to that at an international border. Passengers presenting themselves for boarding therefore are subject to be searched on the basis of mere suspicion. Further, the search is limited to the point where one boards the aircraft, thereby protecting those individuals merely passing by."
- John Rogers, Bombs, Borders, and Boarding: Combating International Terrorism at United States Airports and the Fourth Amendment, 20 Suffolk Transnat'l L. Rev. 501, 530 (1997).

- c. **The Point of No Return: Security Checkpoints.** Individuals wishing to fly on an airplane or enter a sensitive government facility are required to participate in the screening process. Those not willing to undergo security screening have the option of choosing not to enter the security checkpoint. In fact, screening searches are valid only if they recognize the right of a person to avoid a search by electing not to enter the secured area. See, e.g., *United States v. Davis*, 482 F.2d 893, 910-11 (9th Cir. 1973) (airport search). Someone who begins the security screening process, however, no longer has the right to avoid a search by electing to leave. See, e.g., *United States v. Hartwell*, 436 F.3d 174 (3rd Cir. 2006) (one who submits to a screening search in the airport cannot terminate the search by changing his mind and electing not to fly). "As several courts have noted, a right to leave once screening procedures begin 'would constitute a one-way street for the benefit of a party planning . . . mischief,' and would 'encourage . . . terrorism by providing a secure exit where detection was threatened.'" Id. See also *Torbet v. United Airlines, Inc.*, 298 F.3d 1087, 1090 (9th Cir. 2002) ("The Fourth Amendment does not require that passengers be given a safe exit once detection is threatened") (citation omitted); *United States v. Haynie*, 637 F.2d 227, 231 (4th Cir. 1980) ("It appears to us that a rule under which consent to a screening search is limited by the ability to withdraw at any time could only encourage attempted hijacking by providing a secure exit should detection be threatened"); *United States v. Cyzewski*, 484 F.2d 509, 514 n.4 (5th Cir. 1973), cert. denied, 415 U.S. 902 (1974) ("This court has made clear that an investigation need not be curtailed
- d. simply because a suspect decides not to take a particular flight. We have expressly decided to reject the right-to-leave argument").

Z. EPO #26: IDENTIFY CIRCUMSTANCES WHEN A WARRANT IS REQUIRED TO SEIZE VEHICLES SUBJECT TO THE GENERAL FORFEITURE STATUTE

NOTE: AS OF 3-18-08, THIS EPO IS NOT TAUGHT IN ANY FLETC PROGRAM. THE INFORMATION HAS NOT BEEN UPDATED SINCE THE FEBRUARY 2007 REVISION OF THIS LESSON PLAN.

1. **General Rule – Where a Vehicle is Contraband Subject to Forfeiture Under An Applicable Statute, It May Be Seized in a Public Place Without a Warrant.** As a general rule, "where there is probable cause to believe that [a] vehicle is, itself, contraband and subject to forfeiture under applicable statutes, and the vehicle is located in a public place, the vehicle may be seized without a warrant even though there is no separate probable cause to search the vehicle." P. Joseph, *Warrantless Search Law Deskbook* § 20.2, p. 20-11 (2000). See *Florida v. White*, 526 U.S. 559, 561 (1999) (Holding that Fourth Amendment does not require "police to obtain a warrant before seizing an automobile from a public place when they have probable cause to believe that it is forfeitable contraband").

2. **Prohibition on Transporting Contraband.** The general prohibition on using vehicles, aircraft, or vessels to transport contraband is contained at Title 49 U.S.C. § 80302. Subsection (b) of this statute provides that “**a person may not:**
 - a. Transport contraband in an aircraft, vehicle, or vessel;
 - b. Conceal or possess contraband on an aircraft, vehicle, or vessel; or
 - c. Use an aircraft, vehicle, or vessel to facilitate the transportation, concealment, receipt, possession, purchase, sale, exchange, or giving away of contraband.”
3. **“Contraband” – Defined.** “Contraband” is defined in subsection (a) of Title 49 U.S.C. § 80302, and includes in its definition the following items:
 - a. **Narcotics.** A narcotic drug (as defined in section 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (Title 21 U.S.C. § 802)), including marihuana (as defined in section 102 of that Act (Title 21 U.S.C. § 802)), that:
 - 1) **Is possessed with intent to sell or offer for sale in violation of the laws and regulations of the United States;**
 - 2) **Is acquired, possessed, sold, transferred, or offered for sale in violation of those laws;**
 - 3) **Is acquired by theft, robbery, or burglary and transported:**
 - a) In the District of Columbia or a territory or possession of the United States; or
 - b) From a place in a State, the District of Columbia, or a territory or possession of the United States, to a place in another State, the District of Columbia, or a territory or possession; or
 - c) Does not bear tax-paid internal revenue stamps required by those laws or regulations;
 - b. **Firearms.** A firearm involved in a violation of chapter 53 of the Internal Revenue Code of 1986 (Title 26 U.S.C. § 5801 et seq.).
 - c. **Forged, Altered, or Counterfeited Coins or Obligations.** A forged, altered, or counterfeit:
 - 1) **Coin or an obligation or other security of the United States Government** (as defined in section 8 of title 18 [Title 18 U.S.C. § 8]); or
 - 2) **Coin, obligation, or other security of the government of a foreign country.**

- d. **Material or Equipment Used in Making Forged, Altered, or Counterfeited Coins or Obligations.** Material or equipment used, or intended to be used, in making a coin, obligation, or other security referred to in subsection (c), above;
- e. **Cigarettes.** A cigarette involved in a violation of chapter 114 of title 18 [Title 18 U.S.C. §§ 2341 et seq.] or a regulation prescribed under chapter 114 [Title 18 U.S.C. §§ 2341 et seq.]; or
- f. **Copyright Phonorecords or Computer Programs and Documentation**
 - 1) **A counterfeit label for a phonorecord, copy of a computer program or computer program documentation or packaging, or copy of a motion picture or other audiovisual work** (as defined in section 2318 of title 18);
 - 2) **A phonorecord or copy in violation of section 2319 of title 18;**
 - 3) **A fixation of a sound recording or music video of a live musical performance in violation of section 2319A of title 18;** or
 - 4) **Any good bearing a counterfeit mark** (as defined in section 2320 of title 18).
- 4. **Right to Forfeit Conveyances.** Title 49 U.S.C. § 80303 provides the authority to forfeit a conveyance that has been used in violation of Title 18 U.S.C. § 80302. Section 80303 provides, in pertinent part, that an authorized law enforcement officer “shall seize an aircraft, vehicle, or vessel involved in a violation of section 80302 and place it in the custody of a person designated by the Secretary or appropriate Governor, as the case may be.”
- 5. **Exceptions to Forfeiture.** Section 80303 also provides that “the seized aircraft, vehicle, or vessel shall be forfeited.” However, there are two exceptions to the general rule.

- a. **Innocent-Owner Defense.** The statute mandates forfeiture of the conveyance “except when the owner establishes that a person except the owner committed the violation when the aircraft, vehicle, or vessel was in the possession of a person who got possession by violating a criminal law of the United States or a State.” “An owner’s interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use.” Bennis v. Michigan, 516 U.S. 442, 446 (1996). See also United States v. Bajakajian, 524 U.S. 321, 330 (1998) (“Historically, the conduct of the property owner was irrelevant; indeed, the owner of forfeited property could be entirely innocent of any crime”). Nonetheless, section 80303 “contains a limited innocent-owner defense.” United States v. One 1997 Ford Expedition Util. Vehicle, 135 F. Supp. 2d 1142, 1144 (D.N.M. 2001). However, “the only innocent-owner defense allowed by the statute is that an individual other than the owner stole the vehicle or otherwise obtained it illegally, and then used the vehicle to commit a violation of Section 80302.” Id. So, for example, where the individual obtained the vehicle consensually, the innocent-owner would not be available. Id.
- b. **Common Carriers.** When the conveyance is one used by a common carrier, forfeiture may occur only when specific circumstances occur. Specifically, “an aircraft, vehicle, or vessel used by a common carrier to provide transportation for compensation may be forfeited only when
- 1) **The owner, conductor, driver, pilot, or other individual in charge of the aircraft or vehicle (except a rail car or engine) consents to, or knows of, the alleged violation when the violation occurs;**
 - 2) **The owner of the rail car or engine consents to, or knows of, the alleged violation when the violation occurs;** or
 - 3) **The master or owner of the vessel consents to, or knows of, the alleged violation when the violation occurs.”**
6. **Probable Cause is Required to Seize the Conveyance.** “If agents have probable cause to believe that a car is or has been used for carrying contraband, they may summarily seize it pursuant to the federal forfeiture statutes and search it.” United States v. Capra, 501 F.2d 267, 280 (2d Cir. 1974), cert. denied, 420 U.S. 990 (1975). “Indeed, a vehicle may be seized even in the absence of probable cause to believe it contains contraband if there is nonetheless probable cause to believe that it was used ‘to facilitate the transfer of contraband.’” United States v. Johnson, 572 F.2d 227, 234 (9th Cir.), cert. denied, 437 U.S. 907 (1978).

AA. EPO 27. IDENTIFY THE LEGAL STANDARD FOR SEARCHING PEOPLE AND PACKAGES ENTERING AND LEAVING FEDERAL BUILDINGS AND INSTALLATIONS. [MEPO 1211-27]
[TAUGHT ONLY IN IPOTP] LESSON PLAN TRACKS STUDENT TEXT

1. *** The government has a duty to protect the safety of its employees and workplaces from terrorists and others bent on violence. The government has a duty to protect public property from vandalism and theft. The government has a duty to protect the security of sensitive and classified government information. The government has the duty to preserve the efficiency and safety of its workplaces. For all these reasons, the government can, if it meets the restrictions discussed below, conduct gate inspections of inbound and outbound persons, vehicles, and packages entering and leaving federal buildings and installations.
2. Gate inspections directly protect federal property by catching and stopping the entry and exit of problematic people and items. They also indirectly protect federal property because the prospect of being caught by an inspection discourages people from trying to smuggle problematic items in and out of federal installations.
3. Restrictions on Gate Inspections
 - a. People have the fundamental right to be free of unreasonable searches and seizures. People do not lose their Fourth Amendment rights merely because they want to enter a federal building or work for the federal government. Accordingly, there are a number of restrictions imposed on gate inspections to ensure that they are lawful.
 - 1) Inspections must be necessary. This has two components.
 - a) First, there must be a realistic threat of harm. This could be violence, vandalism, theft, security violations or other identified adverse impacts on the safety, welfare or mission of the federal installation and those people on it. The threat must be identified, but it need not be imminent or certain. At the same time, it cannot be based on wildly unlikely conjecture.
 - b) Second, gate inspections must be necessary to prevent the identified threat. If the threat can be prevented by some less intrusive method, that method should be used instead. For example, a large and open federal hospital complex may have a single building containing classified documents. Although it would be sensible to conduct gate inspections at the checkpoint at the door to this building, it would be difficult to justify gate inspections of everyone entering and leaving the complex's front gate solely to protect the classified documents.
 - 2) Gate inspections must be authorized by regulation. The regulation serves several purposes.

- a) The regulation identifies the threat that the inspection is designed to minimize or prevent.
 - b) The regulation tailors how each inspection will be conducted. In setting the scope of the inspection, the regulation must strike a balance.
 - (1) On the one hand, the inspection must be sufficiently thorough to prevent or minimize the identified threat. For example, an inspection designed to prevent employee theft of government desktop computers would legitimately focus on inspecting outbound vehicles and the boxes and other containers in those vehicles big enough to hide desktop computers.
 - (2) On the other hand, the inspection cannot be more intrusive than required to prevent or minimize the threat. Thus, extending the inspection just discussed to allow searching the wallets of inbound personnel would be unreasonable and not permitted.
 - c) These regulations will typically require that notice of the inspection be posted on a sign at all entrances. These regulations also typically state that while a person can refuse to submit to an inspection, his refusal justifies denying him entry to the federal building or installation. These regulations also typically state that if the person chooses to submit to inspection screening by entering the screening area and/or beginning the screening process, he can be required to complete the process.
 - d) The regulation must ensure that inspections are not misused to harass particular individuals or as a subterfuge to conduct a traditional search for criminal evidence when a warrant or probable cause is lacking. This is ordinarily done by adopting procedures to ensure that inspections are done randomly. Among the steps taken are: doing a 100% inspection of every vehicle or person; inspecting every second, third or fourth vehicle as it enters or exits on a given day; or inspecting all vehicles or persons for a given period of time at randomly selected times of the day.
- b. The actual inspection must follow the regulation. For example, if the regulation only authorizes inspections of inbound vehicles, gate guards cannot inspect outbound vehicles. Failure to follow the regulation would result in the exclusion of any evidence found.
4. What happens if a guard discovers illegal drugs or some other plainly incriminating evidence in the course of an authorized gate inspection? The evidence will be seized and held under the plain view seizure doctrine.

References: Inspections generally: Camara v. Municipal Court, 387 U.S. 523, 534 (1967); See v. City of Seattle, 387 U.S. 541, 543-544 (1967). **Public Buildings:** 40 USC § 1315; Downing v Kunzig (1972, CA6 Mich) 454 F2d 1230; Barrett v Kunzig (1971, MD Tenn) 331 F Supp 266, cert den 409 US 914; 53 A.L.R. Fed. 888 – “Validity, under federal constitution, of search conducted as condition of entering public building;” 28 A.L.R.4th 1250 – “Searches and seizures: validity of searches conducted as condition of entering public premises -- state cases.” **Airports:** United States v. Davis, 482 F.2d 893 (3rd Cir. 1973); United States v. Edwards, 498 F.2d 496 (2d Cir. 1974).

Code of Federal Regulations:

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Agricultural Research Service, Department of Agriculture--Conduct on U.S. Meat Animal Research Center, Clay Center, Nebraska, 7 CFR 501.1 et seq.

Agricultural Research Service, Department of Agriculture--Conduct on Beltsville Agricultural Research Center Property, Beltsville, Maryland, 7 CFR 502.1 et seq.

Agricultural Research Service, Department of Agriculture--Conduct on Plum Island Animal Disease Center, 7 CFR 503.1 et seq.

Department of Energy--Control of traffic at Nevada test site, 10 CFR 861.1 et seq.

Office of the Secretary of Defense--Enforcement of State traffic laws on DoD installations, 32 CFR 210.1 et seq.

Office of the Secretary of Defense--Security Protective Force, 32 CFR 228.1 et seq.

Office of the Secretary of Defense--Traffic and vehicle control on certain Defense Mapping Agency sites, 32 CFR 263.1 et seq.

United States Postal Service--Conduct on postal property, 39 CFR 232.1 et seq.

Federal Property Management Regulations--Management of buildings and grounds, 41 CFR 101-20.0 et seq.

Federal Emergency Management Agency, Department of Homeland Security--Conduct at the Mt. Weather Emergency Assistance Center and at the National Emergency Training Center, 44 CFR 15.1 et seq.

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Department of Health and Human Services--Conduct of persons and traffic on the National Institutes of Health Federal enclave, 45 CFR 3.1 et seq.

... Maritime Administration, Department of Transportation--Regulations governing public buildings and grounds at the United States Merchant Marine Academy, 46 CFR 386.1 et seq.

IV. SUMMARY

A. REVIEW OF PERFORMANCE OBJECTIVES

(See Master Syllabus at beginning of lesson plan)

B. REVIEW OF TEACHING POINTS

1. Summarize teaching points
2. Plan time for asking and answering questions

V. APPLICATION

A. LABORATORY

1. Students in the CITP will have a two-hour "Search Warrant Lab" as part of their continuing case investigation, as well as four hours of Probable Cause Lab. UPTP and IPOTP have four hours of a Legal Skills Lab to apply the principles taught in class to scenario-based training, and a two hour Computer Based Skills Lab Practical Exercise. Additional materials regarding these labs and PE are currently stored in a separate folder on the shared "L" drive.

B. PRACTICAL EXERCISE

1. Students in the CITP will have a two-hour practical exercise devoted to drafting a search warrant as part of their continuous case investigation (Phase 9). Additional materials regarding that practical exercise are currently stored in a separate folder on the shared "L" drive.

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TEST ITEM CONTROL SHEET (TICS)

COURSE NUMBER: 1211

COURSE TITLE: Furth Amendment

Point of contact and extension: (b)(6),(b)(7)(C)

Date: March 21, 2008

Instructions: If a course is taught in sessions, put the EXAM number (E01, E02, E03, etc...) that the EPO will be tested on in the EDT. If all EPO's are tested on one exam, place an X in each box instead of the exam number. Using the test item numbers EAD has provided, complete the table below. Every EPO tested by multiple choice exam must be represented in each set with **one** test item. If an EPO is tested by PE or not tested at all put PE or NA in that corresponding EPO row in the program box. A TICS and EDT is required for all courses tested at all FLETC locations. Use more than one form if necessary.

EPO	Set A	Set B	Set C	Set D	CITP	ICE_D	LMPT	UPTP	C_DAITP	ICITP
1.	I02442	I02485	I06304	I06307	E01	E01	E02	E02	E02	E02
2.	I01835 I02438	I01859 I02472	I02427 I02453	I02433 I02473	E01	E01	E02	E02	E02	E02
3.	I02798	I02807	I02810	I02814	E01	E01	E02	E02	NA	NA
4.	I07892	I07893	I07894	I07895	E01	E01	E02	E02	NA	E02
5.	I02428 I02792	I02434 I02793	I02454 I02809	I02481 I02480	E01	E01	E02	E02	NA	E02
6.	I01840	I06283	I07538	I06308	E03	E01	E02	E02	NA	E02
7.	I02426	I02449	I02467	I06329	E03	E01	E02	E02	NA	E02
8.	I02801	I02803	I06306	I06309	E03	E03	E02	E02	NA	NA
9.	I05309	I06284	I02804	I02800	E03	E03	E02	E02	NA	NA
10.	I02791	I02805	I02811	I06310	E03	E03	E02	E02	NA	NA
11.	I02446	I06322	I02450	I06311	E03	E03	E02	E02	NA	NA
12.	I02460	I02440	I01808	I06312	E03	E03	E02	NA	NA	NA

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13.	I02457	I02479	I02435	I06313	E03	E03	E02	NA	NA	NA
14.	I02447	I05311	I05310	I06314	E03	NA	NA	NA	NA	NA
15.	I02431	I02458	I02461	I02475	E03	E03	E02	NA	NA	NA
16.	I02482	I02441	I05312	I06315	E03	E03	E02	E02	NA	NA
17.	I02486	I01867	I05313	I06323	E03	E03	E02	NA	NA	NA
18.	I02477	I01865	I01809	I06316	E03	E03	E02	E02	E02	NA
19.	I02456	I02469	I01817	I02478	E03	E03	E02	E02	NA	NA
20.	I01871	I02429	I02445	I02462	E03	E03	E02	E02	NA	NA
21.	I02430	I02437	I02455	I02474	E03	E03	E02	E02	NA	NA
22.	I02432	I02452	I02510	I06317	E03	E03	E02	E02	E02	NA
23.	I02439	I02451	I06318	I02464	E03	E03	E02	E02	E02	NA
24.	I01874	I02448	I02483	I06319	E03	E03	E02	E02	NA	NA
25.	I02484	I05315	I02463	I06320	E03	E03	E02	E02	E02	NA
26.	I06403	I02476	I05316	I05317	NA	NA	NA	NA	NA	NA

each EPO by

Programs **testing**

or PE

multiple choice exam

EPO	Set A	Set B	Set C	Set D	A_BPOTP	A_FAMTP	C_NNSA_OST
1.	I02442	I02485	I06304	I06307	E02	E02	E01
2.	I01835 I02438	I01859 I02472	I02427 I02453	I02433 I02473	E02	E02	E01
3.	I02798	I02807	I02810	I02814	E02	E02	E01
4.	I07892	I07893	I07894	I07895	E02	E02	E01
5.	I02428 I02792	I02434 I02793	I02454 I02809	I02481 I02480	E02	E02	E01
6.	I01840	I06283	I07538	I06308	E02	E02	E01

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7.	I02426	I02449	I02467	I06329	E02	E02	NA
8.	I02801	I02803	I06306	I06309	E02	E02	NA
9.	I05309	I06284	I02804	I02800	E02	E02	NA
10.	I02791	I02805	I02811	I06310	E02	E02	NA
11.	I02446	I06322	I02450	I06311	NA	NA	NA
12.	I02460	I02440	I01808	I06312	NA	NA	NA
13.	I02457	I02479	I02435	I06313	NA	NA	NA
14.	I02447	I05311	I05310	I06314	NA	NA	NA
15.	I02431	I02458	I02461	I02475	NA	NA	NA
16.	I02482	I02441	I05312	I06315	E02	E02	NA
17.	I02486	I01867	I05313	I06323	NA	NA	NA
18.	I02477	I01865	I01809	I06316	E02	E02	E01
19.	I02456	I02469	I01817	I02478	E02	E02	E01
20.	I01871	I02429	I02445	I02462	E02	E02	NA
21.	I02430	I02437	I02455	I02474	E02	E02	NA
22.	I02432	I02452	I02510	I06317	E02	E02	NA
23.	I02439	I02451	I06318	I02464	E02	E02	NA
24.	I01874	I02448	I02483	I06319	E02	E02	NA
25.	I02484	I05315	I02463	I06320	E02	E02	NA
26.	I06403	I02476	I05316	I05317	NA	NA	NA

Implementation Instructions for EAD:

Program Name	Date for item implementation	Use in all classes after class #	Special Instructions
CITP	03-22-08 04-15-08	815	Starting w/CITP-816-E01/E03 (03-22-08/04-15-08) EPO's #6 & #7 will be tested on E03. All other programs remain the same.

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			 Coordination of TICS Change.msg
LMPT	04-28-08	806	Starting w/ LMPT-807-E02 (04-28-08) EPO #26 will no longer be tested per  email dated 03-12-08. See attachment:  4th Amendment Change - Effect on TI

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Revised by:

(b)(6),(b)(7)(C)

Senior Instructors

Legal Division

information about a neighbor ... or someone nearby ... the informant is exposed to a risk of retaliation from the person named, making it less likely that the informant will lie").

- f. **Various Factors Can Be Used to Justify Investigative Detentions.** Law enforcement officers can utilize a wide variety of factors to justify an investigative detention. "Acts that in isolation may be 'innocent in itself' or at least susceptible to an innocent interpretation, may collectively amount to reasonable suspicion." United States v. Nelson, 284 F.3d 472, 480 (3rd Cir. 2002)(citation omitted). Thus, entirely innocent conduct can, in appropriate instances, justify a Terry stop. See Reid v. Georgia, 448 U.S. 438, 441 (1980)(per curiam)("There could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot"); United States v. Arvizu, 534 U.S. 266, 277-278 (2002) ("Undoubtedly, each of these factors alone is susceptible to innocent explanation, and some factors are more probative than others. Taken together, we believe they sufficed to form a particularized and objective basis for Stoddard's stopping the vehicle, making the stop reasonable within the meaning of the Fourth Amendment"). Some common factors used by officers to justify an investigative detention include:

- 1) **A Suspect's Nervousness is a Factor That Can Be Used to Justify an Investigative Stop.** A suspect's nervousness is a factor that can be considered in determining whether reasonable suspicion exists to support an investigative detention. See, e.g., Illinois v. Wardlow, 528 U.S. 119, 124 (2000)(Noting that Court recognized "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion")(citations omitted); United States v. Bloomfield, 40 F.3d 910 (8th Cir. 1994), cert. denied, 514 U.S. 1113 (1995)("Although it is customary for people to be 'somewhat nervous' when Roberts pulls them over, it is unusual for people to 'fidget' as Bloomfield did when the stop is a 'normal routine' traffic stop"); United States v. Palomino, 100 F.3d 446 (6th Cir. 1996)(Noting "nervousness of a defendant is a factor which can lead to a finding of reasonable suspicion," although "nervousness alone is not a sufficient ground upon which to base a finding of reasonable suspicion"); United States v. Jones, 269 F.3d 919, 928 (8th Cir. 2001)("Nervousness combined

TEST ITEM CONTROL SHEET (TICS)

COURSE NUMBER: 1211

COURSE TITLE: Furth Amendment

Point of contact and extension: (b)(6),(b)(7)(C)

Date: March 21, 2008

Instructions: If a course is taught in sessions, put the EXAM number (E01, E02, E03, etc...) that the EPO will be tested on in the EDT. If all EPO's are tested on one exam, place an X in each box instead of the exam number. Using the test item numbers EAD has provided, complete the table below. Every EPO tested by multiple choice exam must be represented in each set with **one** test item. If an EPO is tested by PE or not tested at all put PE or NA in that corresponding EPO row in the program box. A TICS and EDT is required for all courses tested at all FLETC locations. Use more than one form if necessary.

Exam Distribution Table (EDT)

Programs **testing** each EPO by

multiple choice exam or PE

EPO	Set A	Set B	Set C	Set D	CITP	ICE_D	LMPT	UPTP	C_DAITP	ICITP
1.	I02442	I02485	I06304	I06307	E01	E01	E02	E02	E02	E02
2.	I01835 I02438	I01859 I02472	I02427 I02453	I02433 I02473	E01	E01	E02	E02	E02	E02
3.	I02798	I02807	I02810	I02814	E01	E01	E02	E02	NA	NA
4.	I07892	I07893	I07894	I07895	E01	E01	E02	E02	NA	E02
5.	I02428 I02792	I02434 I02793	I02454 I02809	I02481 I02480	E01	E01	E02	E02	NA	E02
6.	I01840	I06283	I07538	I06308	E03	E01	E02	E02	NA	E02
7.	I02426	I02449	I02467	I06329	E03	E01	E02	E02	NA	E02